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2510
No.11818

United States
Circuit Court of Appeals
For the Ninth Circuit

ANNIS VAN NUYS SCHWEPPE,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of the Record

Upon Petition to Review a Decision of the Tax Court
of the United States

FILED
MAR -4 1948

PAUL P. O'BRIEN,
CLERK

No.11818

United States
Circuit Court of Appeals
For the Ninth Circuit

ANNIS VAN NUYS SCHWEPPE,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of the Record

Upon Petition to Review a Decision of the Tax Court
of the United States

No. 1818

George Washington

General Court of Virginia

For the Year 1791

AN ACT TO AMEND THE

ACT

FOR THE BETTER REGULATION OF THE

COURTS

Transcript of the Report

of the Committee on the Report of the

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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APPEARANCES

For Taxpayer:

W. JOSEPH McFARLAND,
MAYNARD J. TOLL,
SIDNEY H. WALL,
 withdrawn.

ELMO H. CONLEY,
BERT A. LEWIS.

For Commissioner:

E. A. TONJES.

Tax Court of the United States

Docket No. 6415

ANNIS VAN NUYS SCHWEPPE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES

1944

Nov. 4—Petition received and filed. Taxpayer notified. Fee paid.

Nov. 4—Request for Circuit hearing in Los Angeles, Calif., filed by taxpayer. 11/28/44 Granted.

Nov. 21—Copy of petition served on General Counsel.

Dec. 6—Entry of appearance of Maynard J. Toll as counsel filed.

Dec. 28—Answer filed by General Counsel.

1945

Jan. 10—Copy of answer served on taxpayer, Los Angeles, California.

1946

Apr. 16—Hearing set June 10, 1946, Los Angeles, Calif.

1946

June 12—Hearing had before Judge Black on merits. Appearance of Sidney H. Wall as counsel and stipulation of facts with exhibits attached filed at hearing. Petitioner's brief due 8/1/46. Respondent's brief due 9/1/46. Petitioner's reply brief due 10/1/46.

July 8—Transcript of hearing, June 12, 1946, filed.

July 29—Brief filed by taxpayer. Copy served.

Aug. 27—Motion for extension to Oct. 1, 1946, to file respondent's brief and Nov. 1, 1946, to file petitioner's reply brief filed by General Counsel. 8/28/46 Granted.

Oct. 3—Motion for leave to file the attached reply brief, brief lodged, filed by General Counsel. 10/3/46 Granted and Served 10/4/46.

Oct. 31—Reply brief filed by taxpayer. Copy served.

1947

June 19—Findings of fact and opinion rendered, Judge Black. Decision will be entered under Rule 50. Copy served 6/20/47.

Aug. 7—Respondent's computation for entry of decision filed.

Aug. 12—Hearing set Sept. 17, 1947, Washington, D. C., on Rule 50.

Aug. 26—Consent to Respondent's computation filed.

1947

Aug. 28—Decision entered, Judge Black, Div. 15.

Sept. 8—Motion for leave to withdraw W. Joseph McFarland, Maynard J. Toll, and Sidney H. Wall as counsel filed. 9/9/47 Granted.

Sept. 8—Entry of appearance of Elmo H. Conley, and Bert A. Lewis as counsel filed.

Nov. 14—Petition for review by U. S. Circuit Court of Appeals for the Ninth Circuit with assignments of error filed by taxpayer.

Nov. 20—Proof of service filed.

Dec. 17—Praecipe for record filed by taxpayer.

Dec. 17—Stipulation settling record filed.

[Title of Tax Court and Cause.]

PETITION

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (Bureau symbols LA:IT:90D:PD) dated August 10th, 1944, and as the basis of her proceedings, alleges as follows:

1. The petitioner is an individual residing in Los Angeles, California, and having an office at 210 West Seventh Street in that city. The return for the period here involved was filed with the Collector of Internal Revenue for the Sixth District of California.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to petitioner on or after August 10th, 1944.

3. The taxes in controversy are income taxes for the calendar year 1940 in the amount of \$10,110.78 and for the [2*] calendar year 1941 in the amount of \$17,721.81 being a total of \$27,832.59. The amount of the deficiency asserted by the Commissioner for said years totals \$30,716.53.

Assignments of Error

4. The determination of taxes set forth in said notice of deficiency is based upon the following errors:

(a) In determining the taxable net income of the petitioner for the years 1940 and 1941, the Commissioner erroneously included all distributions received by petitioner during said years from the I. N. Van Nuys Building Company.

(b) In determining the taxable net income of the petitioner for the years 1940 and 1941 the Commissioner erroneously failed to allow the proper deduction for depreciation on certain buildings used for the production of income.

(c) In determining the taxable net income of the petitioner for the year 1941, the Commissioner erred in his determination of the fair market value of certain property received by petitioner upon complete liquidation of Bolsa Land Company.

* Page numbering appearing at top of page of original certified Transcript.

Facts

5. The facts upon which petitioner relies as a basis of this proceeding are as follows: [3]

(a) The petitioner was, during the years 1940 and 1941, the owner of one-third of the outstanding capital stock of the I. N. Van Nuys Building Company.

(b) In the years 1940 and 1941 petitioner received upon said stock of the I. N. Van Nuys Building Company distributions in cash of \$35,246.38 and \$24,149.16, respectively.

(c) Of said distributions only the amounts of \$10,746.62 for the year 1940 and \$3,128.02 for the year 1941 constituted distributions from said corporation's earnings or profits accumulated after February 28th, 1913, or from said corporation's earnings or profits of either or any of said corporation's taxable years within which said distributions were made.

(d) The balance of said distributions constituted a return of capital to the petitioner.

(e) The stock owned by petitioner in said corporation was held by her at an unadjusted basis which exceeded the total amount of distributions constituting returns of capital made at any time or times prior to January 1st, 1942.

(f) The depreciation taken by the petitioner during the years in question is reasonable, in accordance with the requirements of the Internal Revenue

Code, and agrees with the deductions taken in preceding years and approved by the Treasury [4] Department.

(g) On December 19th, 1941, petitioner was the owner of twenty-five (25) shares of the capital stock of Bolsa Land Company, which petitioner acquired by bequest, devise or inheritance, as of May 12th, 1940, at a basis of \$25,000.00 as determined by the Commissioner of Internal Revenue as fully set forth in the notice of deficiency, a copy of which is hereto attached.

(h) On or about December 19th, 1941, the Bolsa Land Company completely liquidated and distributed its assets to its shareholders, and at such time the petitioner received her proportionate share of the assets so distributed.

(i) The fair market value of the property distributed to petitioner upon such dissolution was not in excess of \$37,772.20.

Wherefore, Petitioner prays that this court may hear the proceeding, and,

1. Redetermine the amounts of the aforesaid deficiencies determined by the Commissioner of Internal Revenue, and

2. Grant the petitioner such other and further relief as the court may find just and proper.

W. JOSEPH McFARLAND and
MAYNARD J. TOLL,

By /s/ W. JOS. McFARLAND,
Counsel for Petitioner. [5]

State of California,
County of Los Angeles—ss.

Annis Van Nuys Schweppe, being duly sworn, says that she is the petitioner above named; that she has read the foregoing petition, or has had the same read to her, and is familiar with the statements contained therein, and that the facts stated are true, except as to those facts stated to be upon information and belief, and those facts she believes to be true.

ANNIS VAN NUYS SCHWEPPE

Subscribed and sworn to before me this 2nd day of November, 1944.

[Seal] AGNES E. SHULTZ,
Notary Public in and for the County of Los Angeles, State of California.

My commission expires Aug. 31, 1947.

I hereby certify that the foregoing is a true copy of the petition to The Tax Court of the United States signed by me on November 2, 1944.

/s/ W. JOS. McFARLAND

EXHIBIT A

[Letterhead Treasury Department]

Aug. 10, 1944

Office of Internal Revenue Agent in Charge Los
Angeles Division LA:IT:90D:PB

Mrs. Annis Van Nuys Schweppe
210 West Seventh Street
Los Angeles 14, California

Dear Mrs. Schweppe:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1940 and 1941 discloses a deficiency of \$30,716.53, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, at its principal address, Washington, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Los Angeles, California, for the attention of LA:Conf. The signing and filing of this form will expedite the closing of your return(s) by permitting an

early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier,

Very truly yours,

JOSEPH D. NUNAN, Jr.,

Commissioner,

By GEORGE D. MARTIN,

Internal Revenue Agent in
Charge.

Enclosures:

Statement

Form of waiver.

Statement

Mrs. Annis Van Nuys Schweppe

210 West Seventh Street

Los Angeles 14, California

Tax Liability for the Taxable Years Ended
December 31, 1940 and 1941

Income Tax

Year	Liability	Assessed	Deficiency
1940.....	\$12,762.12	\$2,651.34	\$10,110.78
1941.....	22,015.14	1,409.39	20,605.75
Total	\$34,777.26	\$4,060.73	\$30,716.53

In making this determination of your income tax liability, careful consideration has been given to the report of examination dated February 3, 1943,

to your protest dated March 30, 1943, and to the statements made at the conferences held.

The entire amounts distributed to you during the years 1940 and 1941 as a stockholder of the I. N. Van Nuys Building Company are determined to constitute taxable dividends under the provisions of section 115 of the Internal Revenue Code. Accordingly, dividend income from that source has been increased from \$10,746.62 to \$35,246.38 for 1940 and from \$3,128.02 to \$24,149.16 for 1941.

A copy of this letter and statement has been mailed to your representative, Mr. Maynard J. Toll, 433 South Spring Street, Los Angeles 13, California, in accordance with the authority contained in the power of attorney executed by you. [8]

Adjustments to Net Income

Taxable Year Ended December 31, 1940

Net income as disclosed by return.....		\$20,192.88
Additional income and unallowable deductions:		
(a) Dividends received	\$24,499.76	
(b) Depreciation disallowed.....	2,992.69	\$27,492.45
	<hr/>	<hr/>
Total.....		\$47,685.33
Additional deduction:		
(c) Contributions		1,810.39
		<hr/>
Net income adjusted.....		\$45,874.94

Explanation of Adjustments

(a) This represents the increase in dividends received from I. N. Van Nuys Building Company, as previously explained.

(b) Depreciation has been adjusted under the provisions of section 23(1) of the Internal Revenue Code as follows:

Property	Claimed	Allowed	Disallowed
424 South Broadway Building..	\$4,803.60	\$2,530.91	\$2,272.69
San Francisco Building.....	1,200.00	480.00	720.00
Total.....	\$6,003.60	\$3,010.91	\$2,992.69

(c) As a result of the above adjustments an additional deduction for contributions is allowed in the amount of 1,810.39, the total amount paid being \$5,374.00 and the amount claimed as a deduction being \$3,563.61. Section 23(o) of the Internal Revenue Code. [9]

COMPUTATION OF ALTERNATIVE TAX

Taxable Year Ended December 31, 1940

Net income adjusted.....	\$45,874.94
Plus: Net long-term capital loss.....	1,302.37
Ordinary net income.....	\$47,177.31
Less: Personal Exemption.....	1,200.00
Balance (surtax net income).....	\$45,977.31
Less: Earned income credit.....	300.00
Net income subject to normal tax..	\$45,677.31
Normal tax at 4% on \$45,677.31.....	\$ 1,827.09
Surtax on\$45,977.31.....	10,170.92
Partial tax.....	\$11,998.01
Minus: 30% of net long-term capital loss	390.71
Alternative tax.....	\$11,607.30

COMPUTATION OF TAX

Taxable Year Ended December 31, 1940

Net Income Adjusted.....	\$45,874.94
Less: Personal exemption.....	1,200.00
	<hr/>
Balance (surtax net income).....	\$44,674.94
Less: Earned income credit.....	300.00
	<hr/>
Net income subject to normal tax....	\$44,374.94
Normal tax at 4% on \$44,374.94.....	\$ 1,775.00
Surtax on.....\$44,674.94.....	9,649.98
	<hr/>
Total	\$11,424.98
Alternative tax.....	\$11,607.30
Defense tax (10% of \$11,607.30).....	1,160.73
	<hr/>
Total income tax.....	\$12,768.03
Less: Income tax paid at source.....	5.91
	<hr/>
Correct income tax liability.....	\$12,762.12
Income tax assessed:	
Original, account No. 207442.....	2,651.34
	<hr/>
Deficiency of income tax.....	\$10,110.78

ADJUSTMENTS TO NET INCOME

Taxable Year Ended December 31, 1941

Net income as disclosed by return.....	\$ 8,434.30
Additional income and unallowable deductions:	
(a) Dividends received.....	\$21,021.14
(b) Depreciation disallowed.....	2,992.69
(c) Capital gain adjustments.....	28,797.40
(d) Rental income.....	7,000.00
	<hr/>
Total	\$68,245.53
Reductions in income:	
(e) Income from estate.....	\$ 6,907.07
(f) Contributions	3,973.42
	<hr/>
Net income adjusted.....	\$57,365.04

Explanation of Adjustments

(a) This represents the increase in dividends received from I. N. Van Nuys Building Company, as previously explained. [11]

(b) Depreciation has been adjusted under the provisions of Section 23(1) of the Internal Revenue Code as follows:

Property	Claimed	Allowed	Disallowed
424 South Broadway Building..	\$4,803.60	\$2,530.91	\$2,272.69
San Francisco Building.....	1,200.00	480.00	720.00
Total.....	\$6,003.60	\$3,010.91	\$2,992.69

(c) Short-term capital gain reported in the amount of \$2,772.20 on account of distributions received in complete liquidation of Bolsa Land Company has been adjusted to a long-term capital gain of \$30,852.51 under the provisions of sections 113, 115 and 117 of the Internal Revenue Code. It is determined that you acquired twenty-five (25) shares of capital stock of that corporation by bequest, devise or inheritance as of May 12, 1940, at a basis of \$25,000.00; that the fair market value of the money and property received in complete liquidation thereof was \$71,278.77; and that the asset having been held for more than eighteen (18) months but not more than twenty-four (24) months, 66 $\frac{2}{3}$ per cent of the gain received is to be taken into account in computing net income. As a result of this adjustment an addition to income is made in the amount of \$28,080.31.

The long-term capital gain from installment sale, reported in the amount of \$2,650.62, has been determined in the amount of \$3,367.71, an addition to income of \$717.09.

These adjustments result in the addition to income of \$28,797.40, and the determination of net long-term capital gain in the amount of \$10,412.90 in lieu of net long-term capital loss reported in the amount of \$21,156.70.

(d) Rental income from San Francisco building has been determined in the amount of \$19,000.00, in lieu of \$12,000.00 reported in item 9 of your return.

(e) The income reported in item 9 of your return as distributive share of income of the Estate of R. J. Schweppe, Deceased, is eliminated. [12]

(f) As a result of the above adjustments an additional deduction for contributions is allowed in the amount of \$3,973.42, the total amount paid being \$5,461.83 and the amount claimed as a deduction being \$1,488.41. Section 23(o) of the Internal Revenue Code.

COMPUTATION OF ALTERNATIVE TAX

Taxable Year Ended December 31, 1941

Net income adjusted.....		\$57,365.04
Minus: Net long-term capital gain.....		10,412.90
		<hr/>
Ordinary net income.....		\$46,952.14
Less: Personal exemption.....	\$ 750.00	
Credit for dependents.....	400.00	1,150.00
		<hr/>
Balance (surtax net income).....		\$45,802.14
Less: Earned income credit.....		300.00
		<hr/>
Net income subject to normal tax..		\$45,502.14
Normal tax at 4% on \$45,502.14.....	\$ 1,820.09	
Surtax on\$45,802.14.....	17,071.18	
Partial tax.....		\$18,891.27
Plus: 30% of net long-term capital gain		3,123.87
		<hr/>
Alternative tax.....		\$22,015.14

COMPUTATION OF TAX

Taxable Year Ended December 31, 1941

Net Income Adjusted.....		\$57,365.04
Less: Personal exemption.....	\$ 750.00	
Credit for dependents.....	400.00	1,150.00
		<hr/>
Balance (surtax net income).....		\$56,215.04
Less: Earned income credit.....		300.00
		<hr/>
Net income subject to normal tax....		\$55,915.04
Normal tax at 4% on \$55,915.04.....	\$ 2,236.60	
Surtax on\$56,215.04.....	22,922.57	
		<hr/>
Total		\$25,159.17
Alternative tax.....		\$22,015.14
Correct income tax liability.....		\$22,015.14
Income tax assessed:		
Original, account No. 931851.....		1,409.39
		<hr/>
Deficiency of income tax.....		\$20,605.75

Received and filed Nov. 4, 1944.

[Title of Tax Court and Cause.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

1 and 2. Admits the allegations contained in paragraphs 1 and 2 of the petition.

3. Admits that the taxes in controversy are income taxes for the calendar year 1940 and for the calendar year 1941. Admits that the amount of the deficiency asserted by the Commissioner for said years totals \$30,716.53; denies the remainder of the allegations contained in paragraph 3 of the petition.

4. Denies the allegations of error contained in paragraph 4 of the petition.

5. (a) and (b) Admits the allegation contained in subparagraphs (a) and (b) of paragraph 5 of the petition. [15]

(c) to (f), inclusive. Denies the allegations contained in subparagraphs (c) to (f), inclusive, of paragraph 5 of the petition.

(g) and (h) Admits the allegations contained in subparagraphs (g) and (h), of paragraph 5 of the petition.

(i) Denies the allegations contained in subparagraph (i) of paragraph 5 of the petition.

6. Denies each and every allegation contained in the petition not hereinbefore specifically admitted or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved.

/s/ J. P. WENCHEL, ECG
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:

B. H. NEBLETT,
Division Counsel.

EARL C. CROUTER,
E. A. TONJES,
Special Attorneys,
Bureau of Internal Revenue.

EAT/mm 12/20/44

Received and filed Dec. 28, 1944.

8 T. C. No. 144

The Tax Court of the United States

Docket No. 6415

Promulgated June 19, 1947

ANNIS VAN NUYS SCHWEPPE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

FINDINGS OF FACT AND OPINION

A corporation was indebted on a note in the amount of \$400,000 to petitioner's mother, a stockholder. The note was secured by a mortgage on the corporation's building. Interest was paid by the corporation on the note during the lifetime of the owner of it and it was carried on the books of the corporation as a bills payable due her. Petitioner's mother had expressed to certain members of the family her intention to never collect the principal of the debt but during her lifetime she made no formal cancellation of it and did nothing to indicate that she intended to make a contribution of the principal of the note to the capital of the corporation. Upon the mother's death the \$400,000 was transferred to a "Surplus Paid-In" account and subsequently the note was declared barred by the statute of limitations in a suit brought by the executor of the estate against the corporation. In 1940 and 1941 petitioner, a stockholder, received certain distributions from the corporation charged to "Reduction Surplus" account. Held, that peti-

tioner's mother did not gratuitously forgive the indebtedness of the corporation's note; held, further, that the distributions made to petitioner are dividends within the meaning of section 115 (a) of the Internal Revenue Code.

Sidney H. Wall, Esq., for the petitioner.

E. A. Tonjes, Esq., for the respondent.

This proceeding involves deficiencies in income tax for the calendar years 1940 and 1941 in the respective amounts of \$10,110.78 and \$20,605.75. The deficiencies are due to several adjustments to petitioner's net income as disclosed by her returns for the years 1940 and 1941. Petitioner contests three of these adjustments by appropriate assignments of error. In the stipulation filed herein one of the assignments of error was waived and one of the assignments of error was adjusted. Effect will be given to this stipulation in the recomputation under Rule 50. This leaves for our consideration only the contested adjustment for the years 1940 and 1941 which was explained by the respondent in a statement attached to the deficiency notice as follows:

The entire amounts distributed to you during the years 1940 and 1941 as a stockholder of the I. N. Van Nuys Building Company are determined to constitute taxable dividends under the provisions of section 115 of the Internal Revenue Code. Accordingly, dividend income from that source has been increased from \$10,746.62 to \$35,246.38 for 1940 and from \$3,128.02 to \$24,149.16 for 1941.

The sole issue, therefore, is whether the distributions made in the years 1940 and 1941 by the I. N. Van Nuys Building Company constituted "dividends" within the meaning of section 115 (a) of the Internal Revenue Code.

Findings of Fact

The petitioner is an individual residing in Los Angeles, California. Petitioner's income tax returns for the calendar years 1940 and 1941 were filed with the collector of internal revenue for the sixth district of California.

The I. N. Van Nuys Building Company, hereinafter sometimes referred to as the Building Company, was at all times material herein a corporation organized on or about February 15, 1911, and existing under the laws of the State of California. [18]

The petitioner is one of the three living children of I. N. Van Nuys and Susanna H. Van Nuys, both now deceased, the other children being Kate Van Nuys Page and J. B. Van Nuys. I. N. Van Nuys died on February 12, 1912, leaving a last will pursuant to which his entire estate, including the major portion of the shares of the Building Company, was transferred, one-half to his widow, Susanna H. Van Nuys, and one-sixth to each of his three children named above. The petition was during 1940 and 1941 the owner of approximately one-third of the outstanding capital stock of the Building Company. The stock of the Building Company has been at all times between January 1, 1913, and December 31, 1941, held by members of the

Van Nuys family, except for one qualifying share for a director which was held outside the family.

During 1940 and 1941 petitioner received upon the stock of the Building Company distributions in cash of \$35,246.38 and \$24,149.16, respectively.

The Building Company owns certain real property at the southwest corner of Seventh and Spring Streets, Los Angeles, California, up which is located the building commonly known as the Van Nuys Building. This building was constructed approximately in 1912 and 1913 by the Building Company and during the course of such construction Susanna H. Van Nuys loaned to the Company the sum of \$400,000 which loan was evidenced by a promissory note dated March 1, 1913, payable three years after its date with interest at five per cent. This note was secured by a mortgage dated March 1, 1913, on said real property which was never recorded.

In February, 1919, Susanna H. Van Nuys gave to her three children in equal shares all or substantially all of the property distributed to her from her husband's estate and still owned by her at the time. Such property included certain shares of stock of the Building Company. At about the same time she gave to her three children in equal shares the entire balance of shares of the Building Company owned by her independently of her husband's estate except one share which she retained until her death.

At about the time of the aforementioned gift in 1919 as well as before that time and as early as

1915 and as late as 1920 Susanna H. Van Nuys stated to various members of her family including her son, J. B. Van Nuys, who was then secretary of the Building Company, that she did not intend to enforce the collection of the note. She made no attempt during her lifetime to collect the note and it was not surrendered to the Building Company by her during her lifetime nor cancelled, nor the indebtedness represented thereby gratuitously forgiven by her.

Susanna H. Van Nuys died on May 1, 1923, leaving a will executed on October 27, 1920, disposing of her estate in which she made certain specific bequests of real and personal property and left the residue equally to her three children. Her will made no mention of the \$400,000 promissory note of the Building Company or the mortgage given to secure it.

Interest on the \$400,000 note was paid semi-annually to Susanna H. Van Nuys by the Building Company up to and including December 31, 1922, but no amount was ever paid on the principal and no interest was paid after December 31, 1922. Such interest payments were treated as expenses on the books of the Company and on its income tax returns. The Building Company was solvent at all times mentioned herein. The \$400,000 was carried on the books of the Building Company as a liability until January 21, 1924, when the amount was, pursuant to a resolution of the board of directors, transferred to "Surplus Paid-In" account. [20]

The "Inventory and Appraisement" filed on or about November 16, 1923, in the Superior Court of the State of California in the Matter of the Estate of Susanna H. Van Nuys, deceased, showed this \$400,000 note as being of no value, and the Federal estate tax return filed for the estate likewise reported the note as being of no value. In a letter dated September 17, 1925, the respondent advised The Title Insurance and Trust Company, the executor of the will of Susanna H. Van Nuys, of his tentative determination of a deficiency in the Federal estate tax upon this estate, based in part upon his tentative determination that said note should be included as an asset of the estate and should be valued at its face amount of \$400,000. On October 28, 1925, The Title Insurance and Trust Company commenced an action in the Superior Court of the State of California in and for the County of Los Angeles upon this promissory note and for foreclosure of the mortgage against the Building Company. In its answer thereto the Building Company pleaded the statute of limitations in effect in California. The cause was tried on November 4, 1925, before the court without a jury and the court found on November 6, 1925, that by reason of the failure of Susanna H. Van Nuys to institute an action to enforce the payment of this note and/or foreclose the mortgage securing the same within four years after the first day of March 1916, the date upon which the same matured, the said note and mortgage became barred by the statute of limita-

tions and the same were so barred at the time of the death of Susanna H. Van Nuys on May 1, 1923. The court after making its findings of fact stated its conclusions of law as follows: [21]

As a conclusion of Law from the foregoing facts, the court finds that the plaintiff is not entitled to judgment against the defendant; that the note and mortgage securing the same; and each of them is and are, barred by the statute of limitations, and were so barred at all times subsequent to March 1, 1920; that the plaintiff and its successors in interest are estopped and debarred from enforcing the same or assessing any claim or right by reason thereof; that by reason thereof the defendant is entitled to judgment here and it is ordered that judgment be entered accordingly.

A statement of protest, dated January 9, 1926, was filed on behalf of the executor of the estate of Susanna H. Van Nuys, in which protest was made among other things, against the tentative determination of the respondent that the \$400,000 note should be included as an asset of the estate. In a letter dated January 8, 1927, the respondent advised the executor of his determination of a deficiency in the Federal estate tax upon the estate again based in part upon his determination that the \$400,000 note should be included as an asset of said estate at its face amount. No action was taken by the executor before the Board of Tax Appeals with

respect to such notice of deficiency. On or about May 10, 1927, the executor paid to the collector of internal revenue of the sixth district of California, under protest, the amount of the deficiency asserted in said notice. On or about April 19, 1928, the executor commenced an action in the United States District Court for the Southern District of California, entitled Title Insurance & Trust Co. et al v. Welch, 37 Fed. (2d) 617 seeking a refund of a portion of the amount so paid. The court held in that action, among other things, that the \$400,000 note had no taxable market value for Federal estate tax purposes and should not be taxed in said estate, and entered its judgment on July 18, 1929, in favor of the executor for a refund of the amount of tax paid under protest with respect to said note. [22]

On September 13, 1938, the board of directors of the Building Company adopted three resolutions; the first increased the stated capital of the Company by the amount of \$400,000 theretofore transferred to "Surplus Paid-In" as set forth above, the second resolution authorized the reduction of the stated capital of the Company by the amount of \$400,000, and the third resolution authorized the distribution to the shareholders of the Company of the \$400,000 of reduction surplus resulting from the reduction of stated capital. All of the stockholders of the Building Company consented in writing to the reduction of the stated capital of the Company.

On September 13, 1938, pursuant to these resolutions, \$400,000 was transferred by appropriate entries on the books of the Company from "Surplus Paid-In" account to "Stated Capital" account and from "Stated Capital" account to "Reduction Surplus" account.

In the years prior to and including 1937 dividends paid to the stockholders of the Building Company were charged against "Earned Surplus" account. In 1938 and years thereafter the distributions made to stockholders were first charged against the "Earned Surplus" account until that account was exhausted and the balance was charged against "Reduction Surplus" account. The "Earned Surplus" account included all the earnings and profits of the Building Company which were available for distribution to its stockholders at the respective times of the distributions in the taxable years involved, except that respondent contends that the \$400,000 constituted additional earnings or profits, while petitioner contends that it did not constitute earnings or profits.

The total distributions made to petitioner in the taxable years by the Building Company and the accounts charged therefor are as follows: [23]

	Total Distributions Paid	Charged "Earned Surplus"	Charged "Reduction Surplus"
1940	\$35,246.38	\$10,746.62	\$24,499.76
1941	24,149.16	3,128.02	21,021.14

Only the portions of each of the above distributions in 1940 and 1941 which were charged to the "Earned Surplus" account on the books of the

Company were treated as taxable dividends by the petitioner in her income tax returns for those years. Respondent has included as taxable dividends and therefore as additional income to the petitioner for each of the taxable years the portions of these distributions which were charged to "Reduction Surplus" account on the books of the Company.

The stipulated facts are incorporated herein and made a part hereof.

Opinion

Black, Judge: As we have stated above the sole issue herein is whether certain distributions made by the Building Company in the years 1940 and 1941 constituted "dividends" within the meaning of section 115 (a) of the Internal Revenue Code.

Petitioner contends that Susanna H. Van Nuys during her lifetime and while she was a shareholder of the Building Company forgave the indebtedness of the Building Company as to the principal of the \$400,000 note; that this forgiveness of corporate indebtedness by a shareholder constituted a contribution to the capital of the Building Company; that capital so contributed does not constitute "earnings and profits" of the Building Company and that distributions out of such contributed capital to petitioner as a shareholder of the Building Company are not taxable dividends within the meaning of section 115 (a) of the Internal Revenue Code, but should be applied against and reduce the adjusted basis of the stock of the Building Company held by petitioner in accordance with sections

115 (d). The applicable portions of the [24] Internal Revenue Code are set out in the margin.¹

Respondent concedes that if petitioner's premise were sound, namely, that Susanna H. Van Nuy's in her lifetime forgave the indebtedness of \$400,000 to the Building Company and made a contribution of that amount to its capital surplus, then such \$400,000 would not constitute a fund from which taxable dividends could be paid. Respondent contends, however, that such was not the case but that

¹Sec. 115. Distributions by Corporations.

(a) Definition of Dividend—The term "dividend" when used in this chapter (except in section 203(a)(3) and section 207(c)(1), relating to insurance companies) means any distribution made by a corporation to its shareholders, whether in money or in other property, (1) out of its earnings or profits accumulated after February 28, 1913, or (2) out of the earnings or profits of the taxable year (computed as of the close of the taxable year without diminution by reason of any distributions made during the taxable year), without regard to the amount of the earnings and profits at the time the distribution was made. * * *

* * * * *

(d) Other Distributions From Capital—If any distribution by a corporation to its shareholders is not out of increase in value of property accrued before March 1, 1913, and is not a dividend, then the amount of such distribution shall be applied against and reduce the adjusted basis of the stock provided in section 113, and if in excess of such basis, such excess shall be taxable in the same manner as a gain from the sale or exchange of property. This subsection shall not apply to a distribution in partial or complete liquidation or to a distribution which, under subsection (f)(1), is not treated as a dividend, whether or not otherwise a dividend. [25]

the way the Building Company secured freedom from payment of the note was to plead the statute of limitations in a suit brought by the executor of Susanna H. Van Nuys after her death; and that the Building Company's success in having this plea sustained by the court at a time when the corporation was thoroughly solvent resulted in increasing its earnings and profits by the sum of \$400,000.

Respondent therefore contends that the entire distribution of \$35,246.38 and \$24,149.16 paid to petitioner during the years 1940 and 1941, respectively, by the Building Company were paid out of "earnings and profits accumulated after February 28, 1913," and constitute taxable dividends within the meaning of section 115(a), *supra*.

The courts and Treasury Regulations² have long recognized that a gratuitous forgiveness by a stockholder of a debt of his corporation may amount to a capital contribution. See *Carroll-McCreary Co., Inc. v. Commissioner*, 124 Fed (2d) 303; *Amer-*

²Regulations 103.

Sec. 19.22(a) - 14. Cancellation of indebtedness —(a) In general—The cancellation of indebtedness, in whole or in part, may result in the realization of income. If, for example, an individual performs services for a creditor, who in consideration thereof cancels the debt, income in the amount of the debt is realized by the debtor as compensation for his services. A taxpayer realizes income by the payment or purchase of his obligations at less than their face value. (See section 19.22(a)-18.) In general, if a shareholder in a corporation which is indebted to him gratuitously forgives the debt, the transaction amounts to a contribution to the capital of the corporation to the extent of the principal of the debt. [26]

ican Cigar Co. v. Commissioner, 66 Fed. (2d) 425; Commissioner v. Auto Strop Safety Razor Co., 74 Fed. (2d) 226. Respondent maintains that the facts herein do not permit application of the above doctrine.

The problem here is largely one of fact. The question turns upon whether Susanna H. Van Nuys, a stockholder of the Building Company, forgave the indebtedness of the Building Company as to the principal of the \$400,000 note so as to amount to a capital contribution.

We agree with respondent's contention that the evidence herein does not establish that Susanna H. Van Nuys forgave the indebtedness of the Building Company as to the note herein so as to amount to a capital contribution. The evidence shows that during the lifetime of Susanna H. Van Nuys the Building Company continued to pay her interest on the note and carried the note on its books as an obligation which it owed her. It may have been the intent of Susanna H. Van Nuys to never collect the principal of the note, as she indicated at various times in conversations with members of her family, but this falls short of the proof required to establish that payment thereof was forgiven, so as to amount to a capital contribution. No action was taken either by Susanna H. Van Nuys or by the corporation to indicate that the debt had been forgiven. There was no record made, no resolution adopted, nor other action taken consistent with the thought that the indebtedness was forgiven. As we

have already said the note was carried on the books of the Building Company as a liability during her lifetime and she continued to receive payment of the interest. The very fact that interest was paid by the corporation each year on the note to Mrs. Van Nuys and that the corporation continued to carry it upon its books as bills payable shows that she had not in fact forgiven the indebtedness and had not made a capital contribution of it to the corporation. We think it is also significant that in February 1919 when she gave to her three children, including the petitioner, all of the stock of the Building Company owned by her, except one share, nothing was done to show that the payment of the note was to be forgiven so as to vest in the children complete ownership of the Building Company freed from the obligation of the debt. Moreover when the executor of the estate of Susanna H. Van Nuys brought an action on the note in the California court and the Building Company pleaded only the statute of limitations as a defense we think it indicated that the parties believed in [27] the existence of the debt. There was no claim in that suit that Mrs. Van Nuys had forgiven the indebtedness to the Building Company during her lifetime.

Petitioner relies upon *American Cigar Co. v. Commissioner*, *supra*, in support of her contention that a contribution to the capital of a corporation may be made by one of its shareholders by means of a loan to the corporation which the shareholder

does not expect or intend to collect, even though the shareholder holds promissory notes of the corporation evidencing the debt which have never been surrendered or cancelled in any way. The instant case is distinguishable on its facts from that case. In the American Cigar Co. case the taxpayer held bonds and stock of another corporation which was in a poor financial condition and was unable to pay interest on its bonds. The taxpayer was reluctant to allow the debtor corporation to go into receivership and advanced money to enable it to meet its operating expenses and pay interest on its bonds. The taxpayer made the advances firmly believing that the obligations were worthless and uncollectible and were advanced in the belief they would never be repaid. The Second Circuit held that such advances made in the belief that they would not be repaid were in the nature of gifts and contributions to the capital of the debtor corporation. The Building Company herein was solvent during the entire period and there is no evidence whatever that the loan was made in the belief that the amount would not be repaid.

Having found that Susanna H. Van Nuys did not make a contribution to the capital of the Building Company, was the \$400,000 "earnings and profits" within the meaning of section 115 (a) of the Internal Revenue Code? We think it was. In fact we do not understand that petitioner contends to [28] the contrary, if we fail to sustain her contention that Susanna H. Van Nuys forgave the note to the

corporation in her lifetime. When the corporation was relieved of the debt of \$400,000 its free assets were correspondingly increased. This enhancement was due to the judgment of the California court in the suit on the note brought by the executor of the estate of Susanna H. Van Nuys wherein the court upheld the contention of the Building Company that the statute of limitations in effect in California was a bar. It was not until the judgment of the California court that the right of the noteholder was finally determined because the only defense to the payment of the note was the plea of the bar of the statute of limitations which must be affirmatively pleaded and could have been waived. Since the note was barred by the statute of limitations it was not a gratuitous cancellation so as to amount to a gift within the rationale of *Helvering v. American Dental Co.*, 318 U.S. 322. By virtue of the judgment of the California court the amount of \$400,000 was released to the general uses of the Building Company and its assets, previously offset by the obligation of the note, were made available to the Building Company. This benefit, we think, is "earnings and profits" within the meaning of section 115(a). Cf. *U. S. v. Kirby Lumber Co.*, 284 U.S. 1; *Helvering v. American Chicle Co.*, 291 U.S. 426; *Walker v. Commissioner*, 88 Fed. (2d) 170, certiorari denied 302 U.S. 692; *B. F. Avery & Sons, Inc.*, 26 B.T.A. 1393, petition for review dismissed 67 Fed. (2d) 985; *Lutz & Schramm Co.*, 1 T.C. 682; *R. O'Dell & Sons Company, Inc.*, 8 T.C. (promulgated June 9, 1947.) [29]

Petitioner argues that it was not the date of the judgment of the Superior Court of California to the effect that the note was barred by the statute of limitations that is the determinative date. Petitioner argues that inasmuch as the note was barred on March 1, 1920, it was unenforceable from that date. Therefore, contends petitioner, March 1, 1920, is the pivotal date even if respondent's view be accepted. We do not see where that makes any difference. If March 1, 1920, be accepted as the date when the note became unenforceable and petitioner's assets became freed from its payment to the extent of \$400,000, the result is the same so far as we can see.

We hold, therefore, that the distributions herein made to petitioner are dividends within the meaning of section 115 (a) of the Internal Revenue Code.

Decision will be entered under Rule 50.

[Seal] [30]

The Tax Court of the United States

Docket No. 6415

ANNIS VAN NUYS SCHWEPPE,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determination of this Court as set forth in its Findings of Fact and Opinion promulgated June 19, 1947, the respondent herein filed a proposed recomputation on August 7, 1947, to which petitioner filed her acquiescence August 26, 1947, now therefore, it is

Ordered and Decided that there are deficiencies in income tax for the calendar years 1940 and 1941 in the respective amounts of \$10,110.78 and \$14,850.00.

[Seal] /s/ EUGENE BLACK,
Judge.

Entered Aug. 28, 1947 [31]

[Title of Tax Court and Cause.]

PETITION OF TAXPAYER FOR REVIEW
BY THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE NINTH
CIRCUIT, OF A DECISION BY THE TAX
COURT OF THE UNITED STATES

Taxpayer, the petitioner in this case, by Elmo H. Conley and Bert A. Lewis, her Counsel, hereby files her petition for a review by the United States Court of Appeals for the Ninth Circuit of the decision by The Tax Court of the United States, promulgated June 19, 1947, reported in 8 T.C. 1224, and rendered August 28, 1947, determining deficiencies in the petitioner's Federal Income Taxes for the calendar years 1940 and 1941 in the respective amounts of \$10,110.78 and \$14,850. [32]

I.

The petitioner is a resident of Los Angeles, Los Angeles County, California, and was a resident of said City and County at all times during the tax years here involved and at all times subsequent thereto. The income tax returns of the petitioner for the years here involved were filed with the collector's office at Los Angeles, California.

II.

Nature of the Controversy

The controversy involves the proper determination of the petitioner's liability for Federal Income

Tax for the calendar years 1940 and 1941. There is but one question at issue in each of these years and that question is the same for each year. It involves the interpretation of Section 115(a) of the Internal Revenue Code.

During these years taxpayer, as a stockholder in the I. N. Van Nuys Building Company, received cash distributions from said Company with respect to her stock in amounts totalling \$35,246.38 for the calendar year 1940 and \$24,149.16 for the calendar year 1941. It is conceded that of these amounts \$10,746.62 for the year 1940, and \$3,128.02 for the year 1941 were paid out of the "earnings or profits" of said Company, and are taxable as dividend income under Section 115(a) of the Internal Revenue Code. The Commissioner contends that the balance of such distributions was likewise paid out of earnings or profits and is, therefore, taxable as a dividend in each of the years involved, whereas the taxpayer claims [33] that there were no further earnings or profits available to cover said balance and that, therefore, it is not taxable as a dividend but should be applied in reduction of the basis of her stock in said Company.

It is conceded by both parties that the issue thus raised depends upon whether or not an increase in the net assets of said Company in the amount of \$400,000, resulting from the elimination as a liability of the Company of an original indebtedness of that amount to Suzanna H. Van Nuys, taxpayer's mother, constitutes "earnings or profits" of said Company.

Suzanna H. Van Nuys loaned \$400,000 to said Company in 1913 and took its promissory note payable three years after date with interest at 5%. She then owned one-half of the stock in said Company and her three children, of whom petitioner is one, owned the other half. Nothing was done concerning payment when the note matured in 1916, and at various times between 1915 and 1920 she told her children she never intended to enforce collection of the note. In 1919 she gave them all of her stock in the building company except one share, and they, or their families, have owned all of it ever since.

In May, 1923, Mrs. Suzanna H. Van Nuys died still possessing the note upon which interest had been paid through 1922, and leaving a will which mentioned specifically many assets but made no mention of the note. When the question [34] was raised regarding the taxability of the note as an asset in her estate, an action was brought by the Company against the Executor on the note. The Executor successfully pleaded the Statute of Limitations and secured judgment.

Meanwhile, in January 1924, prior to the commencement of the suit to enforce the note, the Company eliminated its liability on the note and transferred the amount to "paid-in surplus." Petitioner maintains that the reflection of this credit as a capital surplus item rather than as "earnings or profits" was and is proper for Federal Income Tax purposes, while the Commissioner claims that it should have been and should be reflected as an "earning or profit."

All of the facts affecting this legal issue are clearly set forth in the findings of fact in the Tax Court opinion and are not in dispute.

III.

The petitioner, being aggrieved by the conclusions of law contained in the Tax Court's opinion and by its decision entered pursuant thereto, desires to obtain a review thereof by the Circuit Court of Appeals for the Ninth Circuit.

IV.

Assignments of Error

The petitioner assigns as error the following conclusions of law of the Tax Court: [35]

1. The finding that the entire distributions received by petitioner from the aforesaid Company in 1940 and 1941 constituted dividend income.

2. The finding that the earnings or profits of said Company properly allocable to the distributions to the petitioner for the year 1940 exceeded \$10,746.62, and for the year 1941 exceeded \$3,128.02.

3. The finding that the elimination of the aforesaid \$400,000 indebtedness by said Company increased its earnings or profits by \$400,000.

4. The finding of deficiencies for the years 1940 and 1941 in the respective amounts of \$10,110.70 and \$14,850 in lieu of a determination that the defi-

ciencies for said years should be respectively \$750.88 and \$4,500.15.

/s/ ELMO H. CONLEY,

/s/ BERT A. LEWIS,

Counsel for Petitioner.

State of California,

County of Los Angeles—ss.

Elmo H. Conley and Bert A. Lewis, each being first duly sworn, says that he is Counsel of record in the above named case; that, as such counsel, he is authorized to verify the foregoing petition for review; that he has read the said petition and is familiar with the statements contained therein; and that the statements are true to the best of his knowledge, information and belief.

ELMO H. CONLEY

BERT A. LEWIS

Subscribed and sworn to before me this 7th day of November, 1947.

[Notarial Seal] FERN E. WORMAN,
Notary Public in and for the County of Los Angeles.

My Commission Expires June 7, 1949.

Filed Nov. 14, 1947. [37]

[Title of Tax Court and Cause.]

NOTICE OF FILING PETITION
FOR REVIEW

To: Charles Oliphant, Acting Counsel, Bureau of
Internal Revenue, Washington, D. C.

Please take notice that the petition on the 14th day of November, 1947, filed with the Clerk of the Tax Court of the United States at Washington, D. C., a Petition for Review by the United States Circuit Court of Appeals for the Ninth Circuit, of a decision by the Tax Court of the United States, heretofore rendered in the above entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you. Dated this 18th day of November, 1947, at Los Angeles, California.

Respectfully,

/s/ ELMO H. CONLEY,

/s/ BERT A. LEWIS,

Counsel for Petitioner.

Personal service of the foregoing Notice together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 20th day of November, 1947.

/s/ CHARLES OLIPHANT, CAR

Chief Counsel,

Bureau of Internal Revenue,
Counsel for Respondent.

Filed Nov. 20, 1947. [39]

In the Tax Court of the United States

Docket No. 6415

ANNIS VAN NUYS SCHWEPPE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

STIPULATION

The parties hereto by their undersigned counsel of record hereby stipulate and agree that the following facts shall be taken as proved in the above mentioned appeal upon the filing of this stipulation, subject to the right of either party to introduce other and further evidence not inconsistent with the terms of this stipulation.

1. The petitioner is now and at all times material herein was an individual residing in Los Angeles, California, and having an office at 210 West Seventh Street in that city. Petitioner's income tax returns for the calendar years 1940 and 1941 (the taxable years here in controversy) were filed with the Collector of Internal Revenue for the Sixth District of California.

2. The respondent determined deficiencies in the petitioner's income tax and set forth his determination by [40] notice dated August 10, 1944, a copy of which is attached to the petition herein and by this reference is made a part hereof.

3. The petitioner waives the assignment of error with respect to disallowance of depreciation contained in subparagraph (b) of paragraph 4 of the petition.

4. The correct amount of "capital gain adjustments" to net income for the year ended December 31, 1941, is \$9,611.56 in lieu of the sum of \$28,797.40 in the notice of deficiency under the caption "(c) Capital gain adjustments \$28,797.40." This adjustment relates to the assignment of error in subparagraph (c) of paragraph 4 of the petition.

5. The sole issue in this proceeding is whether or not certain distributions made in the years 1940 and 1941 by I. N. Van Nuys Building Company constituted "dividends" within the meaning of Section 115 (a) of the Internal Revenue Code. This issue is raised by subparagraph (a) of paragraph 4 of the petition.

6. The I. N. Van Nuys Building Company was at all times material herein a corporation organized and existing under the laws of the State of California, having been organized on or about February 15, 1911.

7. The petitioner was at all times during the years [41] 1940 and 1941 the owner of approximately one-third of the outstanding capital stock of the I. N. Van Nuys Building Company. At all times between January 1, 1913 and December 31, 1941, the stock of said company was held of record as set forth in the schedule attached hereto, marked Exhibit 1-A, and made a part hereof.

8. In the years 1940 and 1941 petitioner received upon said stock of the I. N. Van Nuys Building Company distributions in cash of \$35,246.38 and \$24,149.16, respectively.

9. The petitioner is one of the three living children of I. N. Van Nuys and Susanna H. Van Nuys (both now deceased), the other children being Kate Van Nuys Page and J. B. Van Nuys.

10. I. N. Van Nuys died on February 12, 1912, leaving a will pursuant to which his entire estate, including the major portion of the shares of said I. N. Van Nuys Building Company, was transferred, one-half to his widow, Susanna H. Van Nuys and one-sixth to each of his three children named above.

11. The I. N. Van Nuys Building Company owns and at all times herein mentioned has owned certain real property at the southwest corner of Seventh and Spring Streets, Los Angeles, California, upon which is located the building commonly known as the Van Nuys Building. Said building was constructed approximately in 1912 and 1913 by said company [42] and during the course of such construction Susanna H. Van Nuys loaned to said company the sum of \$400,000 (out of her separate property held by her before the death of I. N. Van Nuys), which loan was evidenced by a promissory note, a copy of which is attached hereto, marked Exhibit 2-B, and made a part hereof.

12. Said note for \$400,000 was secured by a mortgage on said real property, which mortgage was never recorded.

13. In February, 1919, Susanna H. Van Nuys gave to her said three children in equal shares all or substantially all the property distributed to her from her husband's estate and still owned by her at the time. Such property included certain shares of said I. N. Van Nuys Building Company. At about the same time she gave to her said three children in equal shares the entire balance of shares of said company owned by her, except one share which she retained until her death.

14. Susanna H. Van Nuys died on May 1, 1923, leaving a will executed on October 27, 1920, disposing of her estate generally as follows:

Specifically described real property was devised to each of her children separately;

An undivided one-third interest in certain other real property, in a certain trust estate, and in a certain mortgage (not that securing said \$400,000 note) as devised to each of her children; [43]

Certain bank stock was bequeathed to each of her children;

Certain small specific bequests were made; and

The residue was left equally to her said three children.

Neither said \$400,000 promissory note nor said mortgage was mentioned in her will.

15. Interest on said \$400,000 note was paid semi-annually to Susanna H. Van Nuys by said I. N. Van Nuys Building Company up to and including December 31, 1922, but no amount was ever paid on the principal, and no interest was paid after December 31, 1922. Such interest payments were treated as expenses on the books of said company and on its income tax returns. Said company was solvent at all times herein mentioned. The said \$400,000 was carried on the books of I. N. Van Nuys Building Company as a liability until January 21, 1924, when the amount was, pursuant to a resolution of the board of directors, transferred to "Surplus Paid-In" account.

16. The "Inventory and Appraisement" filed on or about November 16, 1923, in the Superior Court of the State of California in the Matter of the Estate of Susanna H. Van Nuys, deceased, showed said \$400,000 note as being of no value; and the Federal Estate Tax Return filed for said estate likewise reported said note as being of no value. In a letter dated September 17, 1925, the Commissioner of Internal Revenue advised Title Insurance and Trust Company, the executor of the will of Susanna H. Van Nuys, of his tentative determination of a deficiency in the Federal Estate Tax upon said estate, based in part upon his tentative determination that said note should be included as an asset of said estate and should be valued at its face amount of \$400,000.

17. On October 28, 1925, Title Insurance and Trust Company, the executor of the will of Susanna

H. Van Nuys, commenced an action in the Superior Court of the State of California in and for the County of Los Angeles, upon said prommisory note and mortgage against the I. N. Van Nuys Building Company. A copy of the judgment roll in said action, consisting of the complaint, answer, findings of fact and conclusions of law, and judgment, is attached hereto, marked Exhibit 3-C, and made a part hereof.

18. A statement of protest, dated January 9, 1926, was filed on behalf of said executor of the estate of Susanna H. Van Nuys, in which protest was made among other things, against the tentative determination of said Commissioner that said \$400,000 note should be included as an asset of said estate, and to which were attached as exhibits copies of the findings of fact and conclusions of law and of the judgment [45] in said action referred to in paragraph 17 above. In a letter dated January 8, 1927, the Commissioner of Internal Revenue advised said executor of his determination of a deficiency in the Federal Estate Tax upon said estate, again based in part upon his determination that said \$400,000 note should be included as an asset of said estate at its face amount. No action was taken by said executor before the Board of Tax Appeals with respect to such notice of deficiency. On or about May 10, 1927, said executor paid to the Collector of Internal Revenue for the Sixth District of California, under protest, the amount of the deficiency asserted in said notice. After a partial re-

jection of a claim for refund filed by said executor, and on or about April 19, 1928 said executor commenced an action in the United States District Court for the Southern District of California, entitled Title Insurance and Trust Co., et al. v. Welch, Collector of Internal Revenue (No. 3150-M), seeking a refund of a portion of the amount so paid. Said court held in that action, among other things, that said \$400,000 note had no taxable market value for federal estate tax purposes and should not be taxed in said estate; and said court entered its judgment in said action on July 18, 1929, in favor of said executor for a refund, inter alia, of the amount of tax paid under protest with respect to said note.

19. On September 13, 1938, the board of directors of said I. N. Van Nuys Building Company unanimously adopted [46] three certain resolutions, the first of which increased the stated capital of said company by said amount of \$400,000 theretofore transferred to "Surplus Paid-In" as set forth in paragraph 15 above (a copy of said resolution being attached hereto as Exhibit 4-D), the second of which authorized the reduction of the stated capital of said company by said amount of \$400,000 (a copy of said resolution being attached hereto as Exhibit 5-E), and the third of which authorized the distribution to the shareholders of said company of the \$400,000 of reduction surplus resulting from said reduction of stated capital (a copy of said resolution being attached hereto as Exhibit 6-F).

20. All of the stockholders of the said I. N. Van Nuys Building Company consented in writing to the reduction of the stated capital of said company in accordance with the resolution referred to in paragraph 19 above.

21. On September 13, 1938, pursuant to said resolutions, \$400,000 was transferred by appropriate entries on the books of said I. N. Van Nuys Building Company from "Surplus Paid-In" account to "Stated Capital" account and from "Stated Capital" account to "Reduction Surplus" account.

22. In all the years prior to and including 1937 dividends paid to the stockholders of I. N. Van Nuys Building Company were charged against "Earned Surplus" account. In 1938 and years thereafter the distributions made to stockholders were first charged against said "Earned Surplus" account until that account was exhausted and the balance was charged against "Reduction Surplus" account. Said "Earned Surplus" account included all the earnings and profits of said company which were available for distribution to its stockholders at the respective times of the distributions in the taxable years involved, except that respondent contends that the said \$400,000 (which was credited to said "Reduction Surplus" account and the status of which is here in issue) constituted additional earnings or profits, while, petitioner contends that it did not constitute earnings or profits.

23. The total distributions made to petitioner by said I. N. Van Nuys Building Company and the accounts charged therefor are as follows:

	Total Distributions Paid	Charged “Earned Surplus”	Charged “Reduction Surplus”
1940	\$35,246.38	\$10,746.62	\$24,499.76
1941	24,149.16	3,128.02	21,021.14

The distributions made out of and charged to “Reduction Surplus” are those in issue in this proceeding as stated in paragraph 5 above.

MAYNARD J. TOLL and
SIDNEY H. WALL,

By /s/ SIDNEY H. WALL,
Counsel for Petitioner.

/s/ J. P. WENCHEL, ECC
Chief Counsel, Bureau of
Internal Revenue. [48]

EXHIBIT 1-A

Record Ownership of Stock

In I. N. Van Nuys Building Company, June 26, 1913, to December 31, 1941

	1-1-13 to 6-25-13	6-26-13 to 7-9-13	7-9-13 to 12-31-13	12-31-13 to 2-27-19	2-27-19 to 9-28-23	9-28-23 to 12-6-27	12-6-27 to 12-13-41	12-13-41 to 12-31-41
Estate of I. N. Van Nuys...12750								
Susanna H. Van Nuys...	99	6574	7499	6574	1*	1*		
J. B. Van Nuys or wife or Van Nuys Invest- ment Company.....	100	2191 $\frac{2}{3}$	2500	2191 $\frac{2}{3}$	4382 $\frac{2}{3}$	4382 $\frac{2}{3}$	4383	4383
Kate Van Nuys Page or Husband	100	2191 $\frac{2}{3}$	2500	2191 $\frac{2}{3}$	4382 $\frac{2}{3}$	4382 $\frac{2}{3}$	4383	4383
Annis Van Nuys Schweppe	100	2191 $\frac{2}{3}$	2500	2191 $\frac{2}{3}$	4382 $\frac{2}{3}$	4372 $\frac{2}{3}$	4373	4383
R. J. Schweppe (husband of Annis Van Nuys Schweppe)						10	10	
H. W. or John O'Melveny	1	1	1	1	1	1	1	1

*Held in Estate of Susanna H. Van Nuys after her death on May 1, 1923.

EXHIBIT 2-B

\$400,000.00

Los Angeles, California, March 1, 1913.

Three years after date, for value received, I. N. Van Nuys Building Company promises to pay to Susanna H. Van Nuys at Los Angeles, California, the sum of Four Hundred Thousand Dollars, with interest from date until paid, at the rate of Five (5) per cent per annum, payable quarterly; should the interest not be so paid, it shall become part of the principal and thereafter bear like interest as the principal. Should default be made in the payment of any installment of interest when due, then the whole sum of principal and interest shall become immediately due and payable at the option of the holder of this note. Principal and interest payable in gold coin of the United States. This note is secured by a mortgage upon real property.

[Seal]

I. N. VAN NUYS BUILDING
COMPANY,

By ANNIS VAN NUYS,
Vice-President.

By J. B. VAN NUYS,
Secretary.

In the Superior Court of Los Angeles County,
State of California

182011

TITLE INSURANCE & TRUST COMPANY, a
Corporation, Executor of the Last Will and
Testament of Susanna H. Van Nuys, deceased,
Plaintiff,

vs.

I. N. VAN NUYS BUILDING COMPANY, a
Corporation,
Defendant.

COMPLAINT

FORECLOSURE OF MORTGAGE

Comes now the plaintiff in the above entitled action, and for cause of action against the defendant complains and alleges as follows, to wit:

I.

That the defendant is now, and was, at all times hereinafter mentioned, a corporation, organized and existing under and by virtue of the laws of the State of California, with its principal place of business in the City of Los Angeles, County of Los Angeles, State of California.

II.

That on or about the 1st day of March, 1913, at

Los Angeles, in the County of Los Angeles, State of California, the defendant executed and delivered to Susanna H. Van Nuys its promissory note in words and figures as follows, to wit:

“\$400,000.00

Los Angeles, California, March 1, 1913

Three years after date, for value received, I. N. Van Nuys Building Company promise to pay to Susanna H. Van Nuys or order, at Los Angeles, California the sum of Four Hundred Thousand Dollars, with interest thereon from date until paid, at the rate of Five (5) per cent per annum, payable quarterly; Should interest not be so paid, it shall become part of the principal and thereafter bear like interest therewith. Should default be made in payment of interest when due, the whole sum of principal and interest shall, at the option of the holder of this note, become immediately due. Principal and interest payable [51] in United States gold coin. This note is secured by a mortgage upon real property.

I. N. VAN NUYS BUILDING
COMPANY,

By ANNIS VAN NUYS,
Vice-President,

By J. B. VAN NUYS,
Secretary.”

III.

That to secure the payment of said principal sum and interest thereon as mentioned, set forth and provided in said note and mortgage, and the various other sums agreed to be paid under the terms of said mortgage and note, the defendant, at the same time and place aforesaid, made, executed and delivered to the said Susanna H. Van Nuys a certain mortgage bearing date the said 1st day of March, 1913, which was duly acknowledged, and a copy of which is attached hereto, marked "Exhibit A," and made a part hereof as fully and to the same extent as if set forth at length herein.

IV.

That the interest on said principal sum mentioned in said promissory note and mortgage has been paid to and including the 31st day of December, 1922, and that no other sum or sums has or have been paid on said note or mortgage, either on account of interest, principal or otherwise; that the principal sum set forth in said promissory note and mortgage and interest thereon at the rate of Five (5%) per cent per annum, compounded quarterly from January 1, 1923, has not been paid.

V.

That plaintiff has incurred a liability to pay an attorney's fee in a reasonable sum to be fixed by the Court for the foreclosure of this mortgage.

VI.

That the said Susanna H. Van Nuys during her life time made and published her last Will and Testament, wherein she appointed [52] the plaintiff executor thereof.

VII.

That the said Susanna H. Van Nuys died on or about the 1st day of May, 1923 in the County of Los Angeles, State of California, and on the 5th day of June, 1923, the last Will and Testament of said decedent was proved and admitted to probate in the Superior Court of Los Angeles County, State of California, and plaintiff appointed executor thereunder; that thereupon Letters Testamentary were issued to the plaintiff, which ever since has been, and now is, the duly appointed, qualified and acting executor of the Estate of Susanna H. Van Nuys, deceased.

Wherefore, the plaintiff prays judgment against the said defendant:

1. For the sum of Four Hundred Thousand (\$400,000.00) Dollars, with interest thereon at the rate of Five (5%) per cent per annum from the 1st day of January, 1923, and for costs of suit.
2. That the usual decree may be made for the sale of said premises by the Sheriff of said county, according to law and the practice of this court; that the proceeds of said sale may be applied in payment of the amount due to

the plaintiff, and that said defendant and all persons claiming under it, subsequent to the execution of said mortgage upon said premises, either as purchasers, incumbrancers, or otherwise, may be barred and foreclosed of all rights, claim, or equity of redemption in the said premises, and every part thereof, and that the said plaintiff may have judgment, and execution against the said defendant for any deficiency which may remain after applying all the proceeds of the sale of said premises properly applicable to the satisfaction of said judgment.

3. That the plaintiff may become a purchaser at said sale; that the sheriff execute a deed to the purchaser; that the said purchaser be let into the possession of the premises on production of the sheriff's deed therefor; and that the plaintiff may have such other or further relief in the premises as to this court may seem meet and equitable.

/s/ HARRY A. CHAMBERLIN,
Attorney for Plaintiff. [53]

State of California,
County of Los Angeles—ss.

W. W. Powell being duly sworn, deposes and says:

That the plaintiff in the above entitled action is a corporation; that he is an officer thereof; to wit: Trust Officer; that he has read the foregoing com-

plaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

/s/ W. W. POWELL.

Subscribed and sworn to before me this 28th day of October, 1925.

/s/ B. S. CHAMBERLIN,
Notary Public in and for the County of Los Angeles, State of California. [54]

“EXHIBIT A”

This Mortgage, Made the First day of March, 1913, By I. N. Van Nuys Building Company, a corporation organized under the laws of the State of California, and having its principal place of business in the City of Los Angeles, Calif., Mortgagor, To Susanna H. Van Nuys, Mortgagee,

Witnesseth: That the Mortgagor hereby mortgages to the Mortgagee all that real property in the City of Los Angeles, County of Los Angeles, State of California, described as follows:

Part of Lots Four (4) and Five (5) in Block twenty-four (24) of Ord's Survey, in the City of Los Angeles, County of Los Angeles, State of California, described as follows:

Beginning at the intersection of the present southerly line of Seventh Street with the Westerly line of Spring Street; thence westerly

along said line of Seventh Street 155.56 feet to the Easterly line of the alley running northerly and southerly through said block; thence southerly along said easterly line 170.72 feet to the Northerly line of the lot now or formerly owned by M. A. Newmark, thence easterly along said Northerly line 155.31 feet to the Westerly line of Spring Street; thence along the same northerly 170.25 feet to the point of beginning.

including all buildings or improvements thereon or that may be erected thereon, together with all and singular the tenements, hereditaments and appurtenances, water and water rights, pipes, flumes and ditches thereunto belonging or in anywise appertaining and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; or for the purpose of securing

First: Performance of the promises and obligations of this mortgage and payment of the indebtedness evidence by a promissory note (and any renewal or extension thereof) in words and figures as follows:

\$400,000.00

Los Angeles, California, March 1, 1913.

Three years after date, for value received, I. N. Van Nuys Building Company promises to pay to Susanna H. Van Nuys or order at Los Angeles, California, the sum of Four Hundred Thousand Dollars, with interest from date until paid, at the

rate of Five (5) per cent per annum, payable quarterly; Should the interest not be so paid, it shall become part of the principal and thereafter bear like interest as the principal. Should default be made in the payment of any installment of interest when due, then the whole sum of principal and interest shall become immediately due and payable at the option of the holder of this note. Principal and interest payable in gold coin of the United States. This note is secured by a mortgage upon real property.

[Corporate Seal]

I. N. VAN NUYS BUILDING
COMPANY,

By.....,
Vice President.

By.....,
Secretary.

Second: Payment of attorney's fees, in a reasonable sum to be fixed by the Court, in any action brought to foreclose this mortgage or in any action, suit or proceeding affecting the rights of the mortgagee herein, whether brought by or against the owner of said real property, involving either the title thereto, the lien of this mortgage thereon, the validity or priority of such lien, or the rights of the mortgagee hereunder, whether such action, suit, or proceeding progress to judgment or not; also

payment of all costs and expenses of such suit, and such sums as said mortgagee may pay for searching the title to the mortgaged property subsequent to the date of the record of this mortgage or for surveying said property, all of which sums, including said attorney's fees, the mortgagor agrees to pay, and the same are hereby declared a lien upon said property and are secured hereby.

Third: Payment of all sums expended or advanced by the mortgagee for taxes, assessments, incumbrances, adverse claims, fire insurance, inspection, repair, cultivation, irrigation, protection, fertilization, fumigation or any other expenditure in connection with the care or maintenance of said property or for any other purpose provided for by the terms of this mortgage, the mortgagee being hereby made sole judge of the necessity of any such expenditures.

Fourth: The mortgagor agrees to pay, as soon as due, all taxes, assessments and incumbrances, which may be, or appear to be, liens upon said property or any part thereof, including taxes, if any are levied or assessed under the laws of the State of California upon this mortgage or upon the debt secured hereby, and hereby waives all right to treat the payment of such taxes or assessments as a payment on the debt hereby secured or as being to any extent a discharge thereof; and the mortgagor agrees to keep said buildings insured against fire, to the amount required by and in such insurance companies as may be satisfactory to the

mortgagee, and to assign the policies therefor to the mortgagee; and promptly to pay [56] and settle (or cause to be removed by suit or otherwise) all adverse claims against said property.

Fifth: In case said taxes, assessments, or incumbrances so agreed to be paid by the mortgagor be not so paid, or said buildings so insured and said policies so assigned, or said adverse claims so paid, settled or removed, then the mortgagee, being hereby made sole judge of the legality thereof, may, without notice to the mortgagor, pay such taxes, assessments or incumbrances, obtain such policies of insurance and pay or settle any or all such adverse claims or cause the same to be removed by suit or otherwise.

Sixth: In the event of a loss under said policies of fire insurance, the amount collected thereon shall be credited first to interest due, if any, upon said indebtedness, then upon any advances secured hereby, and the remainder, if any, may, at the option of the mortgagee, be applied and credited upon said principal sum; or, at the option of the mortgagee, said remainder may be released to the mortgagor for the purpose of making repairs or improvements upon said property, and in that event the mortgagee shall not be obliged to see to the application of the sums so released nor shall said remainder be deemed a payment of any of the indebtedness secured hereby.

Seventh: The mortgagor agrees to keep said property in good condition and repair and to permit no waste thereof, and should said property, or any part thereof, require any inspection, repair, cultivation, irrigation, protection, care or attention of any kind or nature, other than that provided by the Mortgagor, then the mortgagee, being hereby made sole judge of the necessity therefor, and without notice to the mortgagor, may enter, or cause entry to be made, upon said property, and inspect, repair, cultivate, irrigate, fertilize, fumigate, protect, care for, or maintain, said property as said mortgagee may deem necessary. All sums expended by the mortgagee in doing any of the things in this mortgage authorized are hereby secured and shall be paid to the mortgagee by the [57] mortgagor in said gold coin, on demand, together with interest from date of payment, at the same rate of interest as is provided to be paid in the note hereinbefore set out.

Eighth: In consideration of said loan made by said mortgagee, the mortgagor waives all right either to apply for, or to procure, registration of said land or any part thereof under the provisions of an Act adopted November 3, 1914, known as the "Land Title Law," and hereby agrees:

(a) That to bring said land or any part thereof under the operation of said Act would impair the security of this obligation;

(b) That said mortgagor will not cause or permit any part of said land to be brought under the operation of said Act;

(c) That if, at any time, the owner of any part of said property shall file a petition for that purpose, or in the event that any part of said property be registered under the provisions of said Act, the filing of such petition for registration, or such registration, shall each constitute a default in the performance of the covenants and agreements herein contained on the part of the mortgagor, and the whole sum of money secured by this mortgage shall become immediately due and payable at the option of the holder of said note, and the mortgagee may proceed to foreclose this mortgage in accordance with the terms and provisions of paragraphs Ninth and Tenth below.

Ninth: The mortgagor promises to pay said note according to the terms and conditions thereof, and in case of default in payment of the same, or of any installment of interest thereon when due, or if default be made in payment of any other of the moneys herein agreed to be paid, or in the performance of any of the covenants and agreements herein contained on the part of the mortgagor, the whole sum of money then secured by this mortgage shall become immediately due and payable at the option of the holder of said note, and this mortgage may thereupon, or at any time during such default, be foreclosed, and the filing of the complaint in fore-

closure shall be conclusive notice of the exercise of such option by the mortgagee. [58]

Tenth: In the event this mortgage is foreclosed, the decree of foreclosure may provide that the property therein described be ordered sold en masse, or in separate lots or parcels, at the option of the plaintiff in such action.

Eleventh: It is hereby agreed, as a part of the security of the mortgagee hereunder, that if default should be made in the payment of the principal of said promissory note, or if default should be made in the payment of any installment of interest thereon when due, or if default should be made in any other payment in this mortgage provided to be made, or if default should be made in any of the covenants and agreements herein provided to be performed by said mortgagor, then, and in each and every such event, the mortgagee, without any limitation or restriction by any present or future law, shall have the absolute right, upon the filing of a bill in equity or upon any other commencement of judicial proceedings to enforce any right under this mortgage, including the foreclosure of the same, to the appointment of a receiver of the property and premises hereby mortgaged, and of the tolls, earnings, revenues, rents, issues, profits, and other income thereof, and that said receiver shall have full power to collect all such income and after paying all necessary expenses of such receivership and of the operation,

maintenance and repair of said property, shall apply the balance to the payment of any sums due hereunder, such receiver to have such other powers as the Court making such appointment may confer.

Twelfth: The mortgagor agrees that the mortgagee may at any time, without notice, release portions of said mortgaged premises from the lien of this mortgage without affecting the liability of any corporation or person for the payment of the said indebtedness or the lien of this mortgage upon the remainder of the mortgaged premises for the full amount of said indebtedness then remaining unpaid.

This mortgage is also given for the purpose of securing future advances in a sum not exceeding One Hundred Fifty Thousand Dollars, (\$150,000.00) which said sums so advanced shall be equally secured [59] by this mortgage, and bear the same rate of interest.

Thirteenth: The mortgagor hereby mortgages the property hereinbefore described, to secure the performance of every promise and agreement herein contained, direct or conditional, and to secure the repayment to the mortgagee of all sums paid, laid out or expended by the said mortgagee under the terms of this mortgage, and also to secure the attorney's fees and costs provided for by this mortgage in case of a foreclosure thereof.

Fourteenth: Every covenant, stipulation and agreement herein contained shall bind and inure to the benefit of said parties, their heirs, executors, administrators or assigns.

The above and foregoing note and mortgage are made, executed and delivered in pursuance of a resolution duly passed by the Board of Directors of said mortgagor, at a legal meeting thereof duly convened and held on the day of

In Witness Whereof, The said mortgagor has hereunto caused its corporate name and seal to be affixed by its President and Secretary thereunto duly authorized the day and year in this indenture first above written.

I. N. VAN NUYS BUILDING
COMPANY,

By ANNIS VAN NUYS,
Vice President.

By J. B. VAN NUYS,
Secretary.

State of California,
County of Los Angeles—ss.

On this 1st day of March in the year of our Lord One Thousand Nine Hundred Thirteen before me Nellie Lemert, a Notary Public in and for said county, personally appeared Annis H. Van Nuys, known to me to be the Vice President, and J. B. Van Nuys known to me to be the Secretary of Van Nuys Building Company, the corporation that executed the within and foregoing instrument, and known to me to be the persons who executed the within instrument on behalf of the corporation therein named and acknowledge to me that such corporation executed the same.

Witness my hand and official seal the day and year in this certificate first above written.

NELLIE LEMERT

Notary Public in and for the County of Los Angeles, State of California. [60]

In the Superior Court of Los Angeles County,
State of California

No. 182011

TITLE INSURANCE & TRUST COMPANY, a
Corporation, Executor of the Last Will and
Testament of Susanna H. Van Nuys, deceased,
Plaintiff,

vs.

I. N. VAN NUYS BUILDING COMPANY, a
Corporation,
Defendant.

ANSWER

Now comes the above named defendant, I. N. Van Nuys Building Company, a corporation, and for answer to the complaint herein filed, admits, denies and alleges as follows:—

I.

Defendant admits each and every allegation and paragraph of said complaint contained. In making this admission defendant assumes that the payments of interest, alleged in paragraph IV of said Complaint to have been made on the said promissory note, were made in cash.

First Separate Defense

Further Answering Said Complaint and As and For a Separate, and further defense thereto and to the alleged cause of action set forth therein, defendant alleges:

I.

That there is now and was during all the time mentioned in said Complaint, and at the time of the commencement of this action and at the time of the death of Susanna H. Van Nuys, deceased, in full force and effect in the State of California, Subdivision 1 of Section 337, Pt. 2, Tit. 2, Ch. 3, C.C.P. which provides the time in which an action on a written contract must be commenced, which subdivision is in words and figures as [61] follows:

Section #337.

“Within four years. 1. An action upon any contract, obligation or liability found upon an instrument in writing.”

II.

That by reason of the failure of the said plaintiff or the said Susanna H. Van Nuys to commence an action to enforce the said note and/or foreclose the said mortgage within four years after the 1st day of March, 1916, the within action is barred by the Statute of Limitation hereinabove set forth.

Second Separate Defense

Further Answering Said Complaint and As and For a Separate, and further defense thereto and to the alleged cause of action set forth therein, defendant alleges:

I.

That there is now and was during all the times mentioned in said Complaint and at the time of the

commencement of this action and at the time of the death of the said Susanna H. Van Nuys, deceased, in full force and effect in the State of California, Section 360, Pt. 2, Tit. 2, Ch. 4, C.C.P. which is as follows:—

Section #360.

“Acknowledgment or new promise must be in writing. No acknowledgment or promise is sufficient evidence of a new or continuing contract, by which to take the case out of the operation of this title, unless the same is contained in some writing, signed by the party to be charged thereby.”

II.

That the said defendant did not at any time after the execution of said promissory note and mortgage, to-wit, March 1, 1913, acknowledge said note and/or mortgage or promise to pay said note and/or mortgage in writing or otherwise, and said defendant did not at any time renew, extend or revise said note and/or mortgage or make any writing concerning same, and by [62] reason thereof and the laches of said plaintiff and the said Susanna H. Van Nuys to commence an action on said note and/or mortgage prior to March 1, 1920, this said action is barred.

Wherefore, defendant prays that plaintiff take nothing by reason of its complaint and defendant be dismissed with its costs.

CLAUDE I. PARKER,

RALPH W. SMITH,

Attorneys for Defendant.

State of California,
County of Los Angeles—ss.

J. B. Van Nuys, being duly sworn, deposes and says:

That the defendant in the above entitled action is a corporation; that he is an officer thereof; to-wit, President; that he has read the foregoing Answer and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

/s/ J. B. VAN NUYS.

Subscribed and sworn to before me this 30th day of October, 1925.

/s/ MARGUERITE LeSAGE,
Notary Public, in and for the County of Los Angeles, State of California. [64]

In the Superior Court of Los Angeles County,
State of California

No. 182011

TITLE INSURANCE & TRUST COMPANY, a
Corporation, Executor of the Last Will and
Testament of Susanna H. Van Nuys, Deceased,
Plaintiff,

vs.

I. N. VAN NUYS BUILDING COMPANY, a
Corporation,
Defendant.

FINDINGS OF FACTS, AND CONCLUSIONS OF LAW

This cause came on regularly for trial on the 4th day of November, 1925, before the Court without a jury, a jury trial having been duly waived by the respective parties, the Honorable Albert Lee Stephens presiding, and Harry A. Chamberlin, Esq., appearing as attorney for plaintiff, and Ralph W. Smith, Esq., of Claude I. Parker and Ralph W. Smith, appearing as attorney for defendant, and from the evidence, oral and documentary, introduced, the Court finds the facts as follows, to-wit:—

Findings of Fact

I.

That all of the allegations contained and set forth in the complaint and answer are true.

II.

That the plaintiff and defendant were, at all times mentioned herein, and now are, corporations, and that the plaintiff corporation is now, and has been since the 5th day of June, 1923, the duly appointed, qualified and acting executor of the last Will and Testament of Susanna H. Van Nuys, who died on the 1st day of May, 1923, in the County of Los Angeles, State of California. [65]

III.

That the defendant corporation, by and through its duly authorized officers and agents, on March 1st, 1913, at Los Angeles, California, made, executed and delivered to Susanna H. Van Nuys its written promissory note for the principal sum of \$400,000.00, a copy of which note is fully set forth in plaintiff's complaint and in the mortgage attached thereto, marked "Exhibit A," and made a part thereof.

IV.

That the defendant, at the same time and place, made, executed and delivered to Susanna H. Van Nuys a mortgage securing the payment of the principal sum and interest as mentioned in said note, and the various other sums agreed to be paid under the terms of said mortgage and note, a copy of which is attached to plaintiff's complaint marked "Exhibit A"; that said mortgage was duly acknowledged by the makers thereof but the same was not

recorded, or caused to be recorded, by Susanna H. Van Nuys, nor has the same been recorded since her death.

V.

That the interest on said note and mortgage, up to and including December 31, 1922, was paid in cash by the defendant corporation to Susanna H. Van Nuys, and that no further or additional sum has been paid or received thereon, either on account of interest, principal or otherwise.

VI.

That there was never any written acknowledgment or new promise relating in any manner to said note by the maker thereof, or anyone for or on its behalf; that neither said note or mortgage were at any time renewed or extended, or the terms and conditions thereof altered or changed in any manner since the execution thereof. [66]

VII.

That said note and mortgage became barred by the provisions of Subdivision One (1) of Section 337 of the Code of Civil Procedure of the State of California, as set forth in the defendant's answer herein, on March 1, 1920, and was so barred at the time of the death of the said Susanna H. Van Nuys on May 1, 1923, and has been barred at all times subsequent thereto; that said note and mortgage were not, nor were either of them, at the time of the death of said Susanna H. Van Nuys, or at any

time, subsequent to March 1, 1920, nor are they, or either of them, now, a valid and subsisting obligation or enforceable claim or debt, and said note is hereby filed as an exhibit herein, and the same cancelled.

VIII.

That said note and mortgage were included and listed by the plaintiff corporation as the executor of the last Will and Testament of Susanna H. Van Nuys, deceased, as part of the assets of the estate of said deceased in the inventory of said estate duly returned and filed by it and appraised therein as of no value.

IX.

That by reason of the failure of Susanna H. Van Nuys to institute an action to enforce the payment of said note and/or foreclose the said mortgage securing the same within four (4) years after the 1st day of March, 1916, the date upon which the same matured, said note and mortgage became barred by the statute of limitations as set forth and contained in the provisions of Subdivision One (1) of Section 337 of the Code of Civil Procedure, and the same were so barred at the time of the death of said Susanna H. Van Nuys on May 1, 1923, and are now barred.

Conclusions of Law

As a Conclusion of Law from the foregoing facts, the [67] Court finds that the plaintiff is not entitled

to judgment against the defendant; that the note and mortgage securing the same, and each of them, is, and are, barred by the statute of limitations and were so barred at all times subsequent to March 1, 1920; that the plaintiff and its successors in interest are estopped and debarred from enforcing the same or asserting any claim or right by reason thereof; that by reason thereof the defendant is entitled to judgment herein against the plaintiff for its costs incurred herein, and

It Is Ordered that judgment be entered accordingly.

Dated: November 6th, 1925.

/s/ ALBERT LEE STEPHENS,
Judge of the Superior Court.

In the Superior Court of Los Angeles County,
State of California

No. 182011—Dept. 6

TITLE INSURANCE & TRUST COMPANY, a
Corporation, Executor of the Last Will and
Testament of Susanna H. Van Nuys, Deceased,
Plaintiff,

vs.

I. N. VAN NUYS BUILDING COMPANY, a
Corporation,
Defendant.

JUDGMENT

This cause came on regularly for trial on the 4th day of November, 1925, in Department Six (6) of the above-entitled Court, the Honorable Albert Lee Stephens, presiding, and Harry A. Chamberlin, Esq., appearing as attorney for the plaintiff, and Ralph W. Smith, Esq., of Claude I. Parker and Ralph W. Smith, appearing as attorney for the defendant. A trial by jury having been duly waived by the respective parties, the action was tried before the Court sitting without a jury, and evidence, both oral and documentary, having been introduced, and the evidence closed and the cause argued, the same was thereupon submitted to the Court for consideration and decision, and after due deliberation thereon the Court files its Findings of Fact and Conclusions of Law herein and orders that judgment be entered herein against the plaintiff,

Title Insurance & Trust Company, a corporation, Executor of the Last Will and Testament of Susanna H. Van Nuys, deceased, and in favor of the defendant, I. N. Van Nuys Building Company, a corporation.

Now, Therefore, by reason of the law and the finding aforesaid, It Is Hereby Ordered, Adjudged and Decreed that the plaintiff, Title Insurance & Trust Company, a corporation, Executor of the [69] Last Will and Testament of Susanna H. Van Nuys, deceased, take nothing by this action, and that the defendant, I. N. Van Nuys Building Company, a corporation, do have and recover of, and from the said plaintiff, its costs and disbursements incurred herein and taxed in the sum of \$.....

Dated, November 6th, 1925.

/s/ ALBERT LEE STEPHENS,
Judge of the Superior Court.

EXHIBIT 4-D

I. N. Van Nuys Building Company Directors' Resolution Increasing Stated Capital

Whereas, the books of account of this corporation now show that this corporation has a stated capital of \$1,315,000 and a paid-in or donated surplus of \$400,000, and it is deemed to be to the best interests of this corporation and its shareholders that said \$400,000 of paid-in or donated surplus be transferred to the stated capital account and

that the stated capital of this corporation be thereby increased;

Now, Therefore, Be It Resolved that the stated capital of this corporation be increased from \$1,315,000 to \$1,715,000; and

Resolved, Further, that the treasurer or accountants of this corporation be and they hereby are authorized and directed to transfer \$400,000 of the paid-in or donated surplus of this corporation to its stated capital account. [71]

EXHIBIT 5-E

I. N. Van Nuys Building Company

Directors' Resolution Authorizing Reduction of Stated Capital

Whereas, this corporation now has issued and outstanding 13,150 shares, all of one class, of the par value of \$100 each; and

Whereas, the stated capital of this corporation has recently been increased to \$1,715,000 by a transfer of \$400,000 of donated or paid-in surplus to stated capital; and

Whereas, it is deemed to be to the best interests of this corporation that its stated capital be reduced from \$1,715,000 to \$1,315,000, the latter being the aggregate par value of the outstanding par value shares of this corporation; and

Whereas, this corporation has no outstanding shares entitled to preference upon liquidation, and

the stated capital of this corporation as so reduced will be equal to the aggregate par value of all par value shares of this corporation to remain outstanding after such reduction;

Now, Therefore, Be It Resolved that the stated capital of this corporation be reduced from \$1,715,000 to \$1,315,000, the amount of such reduction being \$400,000; and

Resolved, Further, that the officers of this corporation be and they hereby are authorized and directed to procure the approval of these resolutions and the reduction of stated capital herein authorized, by the vote or written consent of the holders of a majority of the outstanding shares of this corporation, and to take such further action as may be necessary and proper to effect the reduction of stated capital of this corporation from \$1,715,000 to \$1,315,000 in accordance with the laws of the State of California. [72]

EXHIBIT 6-F

I. N. Van Nuys Building Company

Directors' Resolution Authorizing Distribution of Reduction Surplus

Whereas, by proceedings heretofore duly taken in accordance with the laws of the State of California, the stated capital of this corporation has been reduced from \$1,715,000 to \$1,315,000, and there has resulted from such reduction of stated capital a surplus of \$400,000; and

Whereas, said surplus of \$400,000 resulting from said reduction of stated capital has heretofore been duly transferred to a reduction surplus account and it is deemed to the best interests of this corporation and its shareholders that assets of this corporation, in the form of cash in the amount of \$400,000, be distributed to shareholders of this corporation, from time to time and in such amounts as may be determined by the directors of this corporation;

Now, Therefore, Be It Resolved that the sum of \$400,000 be distributed pro rata in cash to the shareholders of this corporation from time to time in such amounts per share, and to shareholders of record on such dates, as may be hereafter determined by the directors of this corporation; and

Resolved, Further, that the board of directors of this corporation hereby determines that by such distribution or withdrawal of \$400,000 this corporation will not be rendered unable to satisfy its debts and liabilities when they fall due, and that the assets of this corporation after such distribution or withdrawal, taken at their fair present value, will at least equal one and one-quarter times its debts and liabilities; and

Resolved Further, that the president or vice president and the treasurer or assistant treasurer of this corporation be and they hereby are authorized and directed to sign, acknowledge and file with the Secretary of State of the State of California,

at least fourteen days before such distribution, a certificate in compliance with Section 348(b) of the California Civil Code;

Resolved, Further, that the officers of this [73] corporation be and they hereby are authorized and directed to file in the office of the County Clerk of Los Angeles County, California, being the county in which this corporation has its principal office, a copy of said certificate duly certified by said Secretary of State, and to take such further action as may be necessary and proper to effect the distribution of the assets of this corporation hereinabove authorized, in accordance with the laws of the State of California. [74]

EXHIBIT 7-G

I. N. Van Nuys Building Company

Directors' Resolution Adopted

January 21, 1924

Resolved, That the note for \$400,000 dated February 27th, 1913, now carried on the books of the Company as "Notes Payable" and which note has become outlawed and is no longer enforceable; therefore, be it

Resolved, That the said amount is hereby ordered transferred from "Notes Payable Account" to "Surplus—Paid in Account" by the proper entries on the books of the Company forthwith.

Filed T.C.U.S. June 12, 1946. [75]

Official Report of Proceedings
Before

The Tax Court of the United States

Docket No. 6415

ANNIS VAN NUYS SCHWEPPE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

EXCERPTS FROM THE TRANSCRIPT
OF TESTIMONY

Hearing at Los Angeles, California, June 12, 1946

Evidence on Behalf of Petitioner

Thereupon, the Petitioner, to maintain the averments of her petition, introduced the following proof:

Whereupon,

JAMES R. PAGE

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Wall:

Q. Will you state your full name?

A. James R. Page.

(Testimony of James R. Page.)

Q. You are the husband of Kate Van Nuys Page, are you not, Mr. Page? A. Yes, sir.

Q. And therefore the son-in-law of Mrs. Suzanna H. Van Nuys? A. Yes, sir. [77]

Q. You married Mrs. Van Nuys' daughter sometime before Mrs. Van Nuys' death, did you not, Mr. Page? A. 1914.

Q. Were you connected with the I. N. Van Nuys Building Company prior to the death of Mrs. Suzanna Van Nuys in 1923? A. No, sir.

Q. Were you familiar with Mrs. Van Nuys' financial affairs during her lifetime?

A. Yes, to some extent. To a very considerable extent.

Q. Did she consult with you concerning her affairs from time to time?

A. She discussed her affairs with me. I wouldn't say I was a consultant.

Q. During what period approximately, Mr. Page, did she discuss her affairs with you?

A. Oh, 1915 to the time of her death.

Q. Were you familiar with the \$400,000.00 loan which was made by Mrs. Van Nuys to the Van Nuys Building Company in 1913? A. I was.

Q. And with the note that she held evidencing that loan?

A. I knew that a note existed. I had never seen the note.

Q. Did Mrs. Van Nuys ever refer to the note or

(Testimony of James R. Page.)

to that [78] loan in conversations with you during her lifetime? A. Oh, yes, frequently.

Q. Approximately when were those references made? A. Sunday lunch.

Q. Can you identify approximately the years during which those took place?

A. Oh, I would think from 1915 to, let me see, I was at war a couple of years, 1915 and 1916, and then from 1918 to 1920, around through there.

Q. What did she say to you during those conversations concerning that note, Mr. Page?

A. Well, when she distributed the balance of her husband's estate to her children, she was very emphatic about the fact that she wanted the building to belong to the children, that she never intended to collect the \$400,000.00.

Mr. Tonjes: That is objected to, your Honor, and I move the last portion of that answer be stricken.

It is quite apparent now that what counsel is endeavoring to do is to prove that there was a gift and some sort of a donative action taken with regard to this \$400,000.00. I submit that before there can be any discussion of the intent of the parties there must be some showing that a delivery of some kind of the subject matter was made, either symbolic or otherwise. There has been no showing of that fact to this [79] present moment.

Mr. Wall: If your Honor please, I believe counsel's objection goes rather to the weight than

(Testimony of James R. Page.)

to the admissibility of this testimony. Mr. Page has testified to declarations made by Mrs. Van Nuys, who is now dead, which are definitely contrary to her pecuniary interest at the time and which I believe are clearly admissible under that rule.

The Court: I think in view of the issue that is drawn in this case it would be admissible. Of course, whether or not the circumstances narrated by this witness and perhaps by others would amount to a gift would be a question apparently that the Court will have to decide, but I would overrule the objection.

Q. (By Mr. Wall): Do you know, Mr. Page, whether or not Mrs. Van Nuys ever made any effort to collect the note during her lifetime?

A. Not that I know of. I would not have known it, though, because I had nothing to do with the affairs of the company.

Q. Did she ever mention the note to you during, say, the last year of her life, 1922 and 1923?

A. I don't remember that she did. I don't remember that detail.

Mr. Wall: I have no further questions, Mr. Tonjes.

Mr. Tonjes: No questions.

(Witness exused.) [80]

Mr. Wall: I would like to call Mr. J. B. Van Nuys.

Whereupon,

JAMES BENTON VAN NUYS

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Wall:

Q. Will you state your full name, please, Mr. Van Nuys? A. James Benton Van Nuys.

Q. You are the son, Mr. Van Nuys, of I. N. Van Nuys and Suzanna H. Van Nuys, are you not?

A. Yes, sir.

Q. Are you now associated with the I. N. Van Nuys Building Company? A. I am.

Q. Are you an officer of that company at the present time?

A. I am president of the company.

Q. Were you associated with the company prior to the death of your mother in May, 1923?

A. I was.

Q. Were you an officer of the corporation at that time?

A. I was. I think I was secretary of the company at that time. [81]

Q. Beg pardon?

A. I was secretary of the company at that time.

Q. Do you recall how long before her death you became secretary of the company?

A. I think I was, if my recollection is correct, I was secretary from the inception of the company, organization of the company.

(Testimony of James Benton Van Nuys.)

Q. Was Mrs. Suzanna Van Nuys an officer of the company after the death of your father, I. N. Van Nuys?

A. I think she was president of the company.

Q. How *did* she continue as president?

A. I think until her death.

Q. Are you familiar, Mr. Van Nuys, with the \$400,000.00 loan which was made to the Van Nuys Building Company by Mrs. Van Nuys?

A. I am.

Q. Did Suzanna Van Nuys, your mother, ever take any action during her lifetime to collect the balance of the note?

A. No, sir, she did not.

Q. Did your mother ever refer to the note in conversation with her during her lifetime?

A. Many times.

Q. Can you place those conversations, approximately in time as to years?

A. Well, at various periods she distributed to her [82] children or gave to her children certain real properties and certain securities, and at those various times the condition of her affairs was discussed quite definitely, and my recollection of those times, she had stated repeatedly that she did not intend to enforce the collection of the note or collect on the note, did not expect to collect the funds represented by the note.

Q. I am not sure you quite answered my question, in point of years. You said that she did mention it several times and at the times of distribu-

(Testimony of James Benton Van Nuys.)

tions. Can you recall the approximate years during which those conversations took place?

A. Well, I think she distributed or gave to us in 1918 or 1919——

Q. It is in evidence here that she gave the stock of the Building Company in 1919, Mr. Van Nuys. Does *the* refresh your recollection?

A. That was the date, I think, quite definitely, and prior to that time she also gave us some real property she owned that was not part of my father's estate, in San Francisco, and her various affairs were discussed there. She made distribution or gifts to us of certain real properties. I think the same time she gave us this stock that she had inherited from my father, and at those various times definitely, I think, the \$400,000.00 note was discussed or mentioned by her. [83]

Q. What did she say concerning it?

A. That she did not expect to collect the note, and she considered that she was giving us the stock of the Building Company so the children owned the Building Company.

Mr. Wall: Thank you. I have no further questions.

Cross-Examination

By Mr. Tonjes:

Q. Mr. Van Nuys, were you active in the affairs of the Van Nuys Building Company?

A. Yes, sir.

Q. And were you active in it during the years

(Testimony of James Benton Van Nuys.)

1919 and sometime prior thereto? A. Yes, sir.

Q. For how long a period?

A. Well, I was secretary of the company and active in it from its formation, which was in 1910 or '11, sometime like that.

Q. So you were active in the affairs of the corporation during all of that period?

A. Yes, sir.

Q. Did you direct its affairs to some extent?

A. Yes, sir.

Q. Would you say then you occupied a dominating position in the organization after your mother died?

A. Well, I personally have since her death, yes, I [84] have been chief executive officer.

Q. You say there had been some discussion with your mother with regard to whether or not this note would be paid?

A. Yes, particularly that she repeatedly stated to me that she did not expect the note to be paid.

Q. She did not expect it to be paid?

A. Yes.

Q. Do you know upon what she based that expectation?

A. She was fully aware that she could collect the note, the company was solvent, so it must have been that she did not intend to collect it, had no desire to collect it.

Q. At what time was that intention first expressed?

A. I don't know what time, but at various times,

(Testimony of James Benton Van Nuys.)

particularly I should say, to the best of my recollection, when this distribution of stock made by her or her gift of this stock to her children, and also the gift of certain real properties to her children.

Q. Would you say that she never expressed any thought of not collecting the debt until after the stock was given to the children?

A. No, I think she expressed that many times before, even before the stock was given to the children as well as after the stock was given to the children.

Q. Can you fix a date that she first made any such expression? [85]

A. Well, I could quite definitely fix it by ascertaining when certain real property in San Francisco was given to the children, but my recollection, of course, it is 25 years and it pretty hard to fix dates 25 years back.

Q. Were all those expressions made informally at home or at some meeting of the stockholders or directors of the corporation?

A. Well, I should say the vast majority were made informally at least at family lunches or—we are quite clannish and we had various meetings, formal and informal, even to this date, and those statements were made under those circumstances. I do not have any distinct recollection it was ever mentioned at a formal organization meeting, although I certainly would not testify that it was not made there.

Q. Did she attend any of the meetings at all?

A. Oh, yes, sir.

(Testimony of James Benton Van Nuys.)

Q. But you don't recall that ever having been discussed at the meetings, is that right?

A. No, I don't recall that it was not discussed either.

Yes. Now, how much capital did the organization have?

A. 1,300,000 shares, or something like that,—or 1,300,000 dollars.

Q. So with regard to the relative importance of the \$400,000 note to the total capital of the corporation, it [86] was a substantial sum, was it not?

A. Yes.

Q. And ordinarily items of contributions to capital to the extent of \$400,000.00 in amount would be very seriously thought over and discussed in formal meetings, would they not?

A. Well, this is the only time this corporation ever had a \$400,000.00 gift to it, so at no other time did the subject come up.

Q. When the expressions of your mother were made, did you give any consideration at all to the effect it might have on the payment of interest on the note?

A. I don't think so. I don't think the question of interest came up.

Q. As a matter of fact, interest was paid on the note until your mother died, isn't that correct?

A. Correct.

Q. It was paid to her semi-annually?

A. Yes, sir.

(Testimony of James Benton Van Nuys.)

Q. And the last payment was made in November, 1922? A. I am not sure of the date.

Q. In any event, payment was made up to the last period during your mother's life?

A. Yes, sir.

Q. Did you give any thought to whether or not the company [87] had any right to pay interest on a debt which it did not owe?

A. No, I did not. In fact, the note had been overdue in 1916, and I presume it was a matter of——

The Court: You mean it had become due in 1916?

The Witness: Yes, sir, and I think just as a matter of course of business that interest was paid on it and continued to be paid. I don't think the question ever came up, so I didn't realize that the note had—the statute of limitations had cancelled it, been paid.

Q. (By Mr. Tonjes): You would not have paid the interest on the note if you did not recognize it as a subsisting obligation, would you?

A. I would have to answer that by saying that the interest was paid semi-annually since 1913, was that when the note was created?

Q. Yes.

A. And I don't think—it was a family affair. It was paid semi-annually, just was paid semi-annually.

(Testimony of James Benton Van Nuys.)

Q. I don't want to start an argument with you, Mr. Van Nuys, but there seems to me to be a strong inconsistency in the situation here. If the interest was paid, insofar as the corporation was concerned, it must have recognized that it was indebted to Mrs. Van Nuys, your mother, to the extent of \$400,000.00, isn't that correct? [88]

A. Yes, I say I am—I don't know whether I can agree with you on that interest, whether or not it created any—I know that this was set up in a certain manner like certain other instruments and the interest was paid. Now, I don't think it ever occurred to us that the note had become exterminated by the statute of limitations. I don't think that question was considered. I know it was never brought up and discussed.

If it had been brought up and discussed, then I could definitely tell you she stated she knew that it was paid or had been paid.

Q. Did you inquire into the effect of the Statute of Limitations on this note?

A. Inquire into the process of the Statute, you say? The title company raised it at that time as executors.

Q. Was there any question raised with regard to the effect of the Statute of Limitations, we will say, in 1920 or '21?

A. No, sir, I don't think anybody was aware of the Statute of Limitations at that time.

Q. Do you know why no formal cancellation of the note or surrender of the note was had by your

(Testimony of James Benton Van Nuys.)

mother if she never expected to collect the note?

A. I know of no reason.

Q. The accounts were adjusted for the first time to show [89] that the note no longer constituted an obligation in 1924, is that correct?

A. I am not sure.

Mr. Wall: I will stipulate that it was so.

The Witness: I have no certain recollection, but I think the dates are all in evidence.

Q. (By Mr. Tonjes): Do you recall what the circumstances were which prompted the action regarding the transfer of that sum from a debt to what has been described in the stipulation as surplus paid in, at or about that time?

A. No, I can't recall positively, but I know that the earnings of the corporation from current operations, a certain portion of those earnings were accumulated for further future investments. Then there came a time when the earnings—when the accumulation was no longer thought necessary by the directors, and the extra earnings of the company, as I remember, constituted a surplus account, and the transfer was made to surplus account, which was the proper legal way to handle those distributions, I understand.

Q. Yes. But do you know what prompted that particular action at that time?

A. I don't know at this time. I don't recall. But I know there was a time when all the earnings were not distributed, they were accumulated, then

(Testimony of James Benton Van Nuys.)

there was a time when [90] all the earnings were distributed.

Q. The time I am concerned with is at the time that you made certain transfers to surplus account, Mr. Van Nuys, and we have a stipulation that certain resolutions concerning the further transfer of this sum of \$400,000.00 were made in 1938. Can you recall the circumstances of the adoption of those resolutions? A. No, I do not at this time.

Q. You don't know what prompted that action at or about 1938?

A. No, I haven't any recollection at this time.

Q. Or why the question was brought up at that time?

A. No more than what I have said. I think it was on account of the size of the distributions.

Q. I will make the statement over again and get my question right, Mr. Van Nuys. The first question I asked a moment ago when you gave me your answer related to some resolutions back in 1924, that is when the amount was charged on your books, when the amount represented by the note was put in surplus paid in. A. Yes.

Q. Then after that, in 1934 and 1938, there were some further resolutions concerning the change of characterization of that sum. Do you have any knowledge now of what occurred at that time which prompted the adoption of those resolutions [91] at that time?

A. No. As I stated, I should judge by that action there that there was a question raised about

(Testimony of James Benton Van Nuys.)

how that should be treated in the distribution of securities. Of course, it seems logical, I should say, in 1924 was about the time that Mrs. Van Nuys', my mother's estate was settled, and in our opinion the people of the company had determined through what she said that there had been a gift of that note and that it no longer existed, and therefore the corporation probably had instructions from its attorneys as to that and this apparently is the course that they advised. That would be the 1928 transaction.

Then the 1928 transaction was probably a distribution made and it was set up that way by the board of directors.

Q. Did you seek the advice of counsel in that connection? A. Yes, sir.

Q. Who was the counsel?

A. O'Melveny & Myers.

Q. Were they your tax counsel as well?

A. Yes, our counsel.

Q. Your general counsel? A. Yes, sir.

Mr. Tonjes: I think that is all, Mr. Van Nuys.

Redirect Examination

By Mr. Wall: [92]

Q. May I ask you one more question, Mr. Van Nuys? It is true, is it not, that this I. N. Van Nuys Building Corporation has been and is still a family corporation where all of the stock, or substantially all of the stock has been held within your own family? A. Yes, sir.

Q. And there were no other persons beneficiaries or interested in the company except the members of your family?

A. That is right. There are a few others who have qualifying shares to be directors but all of the others are held by the family.

Mr. Wall: That is all.

Mr. Tonjes: No further questions. Thank you.

(Witness excused.)

Mr. Wall: I would like to call Mr. Ralph W. Smith.

Whereupon,

RALPH W. SMITH

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Wall:

Q. State your name for the reporter, please.

A. Ralph W. Smith.

Q. What is your occupation or profession, Mr. Smith? [94]

A. I am an attorney.

Q. Did you at one time represent the executor and heirs of the Estate of Suzanna H. Van Nuys, deceased?

A. I did.

Q. In connection with the determination of the Federal Estate Tax on that estate?

A. I did.

(Testimony of Ralph W. Smith.)

Q. Do you recall approximately when that representation took place?

A. Oh, about 20 years ago, 1925 or '26, along in there.

Q. Do you recall, Mr. Smith, a controversy in that connection concerning the inclusion in the estate of Mrs. Van Nuys for Federal Tax Purposes of the value of a certain \$400,000.00 note of the I. N. Van Nuys Building Company, dated March 1, 1913, and payable in 1916 to Suzanna H. Van Nuys?

A. I know there was a note for \$400,000.00. The date I don't remember exactly.

Q. Mr. Smith, it is in evidence here that under date of September 17, 1925, the Commissioner of Internal Revenue sent an official 30-day letter to the executor of Mrs. Van Nuys' estate advising about the tentative determination of a deficiency in the Federal Estate Tax, basing his determination in part on a tentative determination that the \$400,000.00 note to which I have just referred should be included as an asset of the estate and should be valued at its [94] face amount of \$400,000.00. Do you recall that?

A. I do.

Q. It is also in evidence here, Mr. Smith, that in October, 1925, the Title Insurance & Trust Company as executor of Mrs. Van Nuys' estate commenced an action in the Superior Court against the I. N. Van Nuys Building Company on that note. Do you recall that action?

A. I do.

Q. Did you advise the institution of that action, Mr. Smith?

(Testimony of Ralph W. Smith.)

A. I think I did. It is my recollection that I did.

Q. Will you please state the circumstances under which you gave that advice?

A. Well, there was at the time a dispute as to the value of the note in that estate, and there was a question raised by the Inheritance Tax Department.

Mr. Tonjes: May I interrupt the witness, your Honor? Just to ask the counsel the materiality of this matter on these particular issues. I don't quite appreciate it.

Mr. Wall: The materiality is for the purpose of explaining the circumstances under which the action was brought on the note by the executor of Mrs. Van Nuys' estate, which was commenced in 1925. That case on the note I expect will be relied upon by counsel for the respondent as an indication that the note was considered by the executor and by [95] the heirs of Mrs. Van Nuys as being alive even after her death, contrary to the testimony which the petitioner has presented. I think the Petitioner is entitled to show the circumstances under which the action was prosecuted, to give the facts their true setting.

The Court: I will hear the testimony. You may answer.

The Witness: Will you read the answer as far as I had gone.

(The answer was read.)

The Witness: Considered the note a valid and subsisting obligation of the estate, and as I recall,

(Testimony of Ralph W. Smith.)

there was a compromise in the Inheritance Tax Department as to the value of the note on the basic date. I was of the opinion very definitely that the note had no value since the Statute of Limitations had run, and the only evidence of a recognition of the obligation was the payment of the interest. The State of California, I know, took the position that the payment of interest alone prevented the running of the Statute or was a renewal of the obligation, and my position was when I took over the case to the Federal that that was not sufficient right or recognition to prevent the tolling of the statute. For that reason I felt it was necessary and I knew it would become necessary later for the Federal Government purposes to get an adjudication, and so I [96] recommended to the Executor that I felt it advisable for the Executor as such to bring an action to determine just the status of the note as to its validity and its collectability, and they brought that action in the Superior Court of this County, and an answer was filed and the matter was heard and findings and a judgment was entered, as I remember it, holding that the note did not have value by reason of the fact that the Statute of Limitations had tolled on the obligation.

Q. When you mentioned the Inheritance Tax authorities, Mr. Smith, you were talking about the California State Inheritance Tax authorities, were you?

A. That is right.

Q. They had raised the question of the value of the note there?

A. That is true.

(Testimony of Ralph W. Smith.)

Q. In addition to the question raised by the Federal Estate Tax office?

A. It was our idea to determine that, and we had a judgment and it was settled before we got to the Federal Estate Tax. That came in later on.

Q. Mr. Smith, when you advised the bringing of this action, did you have then any knowledge of the intentions of Mrs. Suzanna H. Van Nuys with respect to the collection of that note? [97]

A. No, I knew nothing about that. You are talking about this testimony about the gift here?

Q. That is correct.

A. I didn't know anything about that until yesterday.

Mr. Wall: That is all.

Cross-Examination

By Mr. Tonjes:

Q. Mr. Smith, you stated, I believe, that you came to the conclusion that this note was of no value because the Statute of Limitations had run.

A. That is true.

Q. That was when?

A. That was in—I came in the picture, I think, in about 1925.

Q. Now, would the fact that the Statute of Limitations had run make the note valueless?

A. Well, the Statute, no, but it is an affirmative defense in a suit. Is that what you mean?

Q. Yes. It must be affirmatively pleaded and proven, is that correct? A. Yes.

(Testimony of Ralph W. Smith.)

Q. So that in the event that the defendant recognized his obligation to pay he could have a judgment rendered against him on that basis on a suit on the note?

A. Oh, yes, if the note—if he had not pleaded the [98] Statute of Limitations in this action, I assume that the Estate and the Executor would have gotten judgment.

Q. This was, of course, a family corporation, as you understood it? A. Entirely, yes.

Q. And the deceased was at one time one of the principal stockholders? A. That is true.

Q. And was the mother of the principal stockholders at the time of her death?

A. I don't get that.

Q. Under those circumstances, did you give any thought to the possibility that the corporation would honor this note?

A. Well, it didn't indicate that it intended to honor the note.

Q. Would you say that the payment of interest until the date of the death was an indication that it would honor the note or not?

A. Well, we have got dozens and dozens of cases in California—

Q. I am talking about this case, however.

Mr. Wall: I object to that.

Mr. Tonjes: He stated his opinion on that. I think I have a right to inquire into his reasons for his conclusion.

The Court: If he agreed with you on that, would that [99] have anything to do with this case? This

(Testimony of Ralph W. Smith.)

is a gift, it would seem. I will permit the answer, however. I will overrule the objection. Read the question, please.

(The question was read.)

The Witness: It may be so construed.

Q. (By Mr. Tonjes): In other words, you stated there was no indication which would lead you to believe that they would pay the note, and I am directing your attention to the fact that the corporation did pay interest right up to the date of death, and considering that fact and the fact that the corporation owed the money to the mother of the principal stockholders, did you consider those facts in arriving at your conclusion that the note had no value?

A. Well, I felt this: The note, in my opinion, had no value, because of the Statute of Limitations. Many other lawyers interested in this matter, this kind of a situation favored the view that payment of interest was sufficient to keep the note alive. I took the opposite position and the Court sustained me, and the District Court sustained me out here.

Q. But did you consider those factors, Mr. Smith?

A. No, I don't think I gave any consideration to them.

Mr. Tonjes: You did not. That is all.

Mr. Wall: I have no further questions. Thank you, [100] Mr. Smith. Petitioner rests, if your Honor please.

(Witness excused.)

Mr. Tonjes: The respondent rests, your Honor.

The Court: Very well.

Perhaps this case had better be briefed by Petitioner filing an opening brief and the Respondent an answering brief, and then the Petitioner file its final brief in the case.

Mr. Wall: That will be entirely satisfactory to me, your Honor.

The Court: Will fixing the date of August 1st for the opening brief be sufficient time?

Mr. Wall: August 1st, yes, your Honor, that is satisfactory.

The Court: And the Commissioner is given until September 1st to file his answering brief and the Petitioner may have until October 1st to file the reply brief.

Mr. Wall: Is that October 1st, your Honor?

The Court: Yes.

Mr. Wall: Thank you. That will be satisfactory.

Mr. Tonjes: Thank you, your Honor.

(Whereupon, at 10:45 a.m., June 12, 1946, the hearing in the above-entitled matter was closed.) [101]

[Title of Tax Court and Cause.]

STIPULATION SETTLING RECORD

The parties hereto, by their undersigned Counsel of record, hereby stipulate and agree pursuant to Rule 75(f) of the Rules of Civil Procedure for the District Courts of the United States, and Rule 30, paragraph 2 of the Rules of Practice and Procedure

of the Ninth Circuit Court of Appeals, that the parts of the record, proceedings and evidence to be included in the Record on Appeal in the above entitled matter shall consist of the following:

1. The docket entries of all proceedings before the Tax Court.
2. Pleadings before the Tax Court as follows:
 - (a) Petition for redetermination.
 - (b) Answer of Respondent.
3. The Findings of Fact and Opinion of the Tax Court. [102]
4. The decision of the Court.
5. Stipulation of fact filed herein together with Exhibits 1-A, 2-B, 3-C, 4-D, 5-E, and 6-F attached thereto, and Exhibit 7-G as admitted in evidence per stipulation in open Court.
6. Transcript of testimony adduced at the hearing of the above entitled proceeding at Los Angeles, California, on June 12, 1946, omitting therefrom the opening statements of Counsel commencing on page 2 thereof and extending down to the phrase "evidence on behalf of petitioner" on page 17 thereof.
7. The Petition for Review filed by the Petitioner in the above entitled case.

/s/ CHARLES OLIPHANT, CAR
Counsel for Respondent.

/s/ ELMO H. CONLEY,
/s/ BERT A. LEWIS,

Counsel for Petitioner.

Filed Dec. 17, 1947. [103]

[Title of Tax Court and Cause.]

PRAECIPE FOR RECORD

To the Clerk of The Tax Court of the United States:

You are hereby requested to prepare and certify and transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, with reference to Petition for Review heretofore filed by the petitioner in the above case, a transcript of the record in the above case, prepared and transmitted as required by law and by the rules of said Court, and to include in said transcript the following documents, or certified copies thereof, to wit:

1. The docket entries of all proceedings before the Tax Court.
2. Pleadings before the Tax Court as follows:
 - (a) Petition for redetermination.
 - (b) Answer of Respondent. [104]
3. The Findings of Fact and Opinion of the Tax Court.
4. The decision of the Court.
5. Stipulation of fact filed herein together with Exhibits 1-A, 2-B, 3-C, 4-D, 5-E, and 6-F attached thereto, and Exhibit 7-G as admitted in evidence per stipulation in open Court.
6. Transcript of testimony adduced at the hearing of the above entitled proceeding at Los Angeles, California, on June 12, 1946, omitting

therefrom the opening statements of Counsel commencing on page 2 thereof and extending down to the phrase "evidence on behalf of petitioner" on page 17 thereof.

7. Stipulation Settling Record.

8. This Praecept.

/s/ ELMO H. CONLEY,

/s/ BERT A. LEWIS,

Attorneys for Petitioner.

Received and filed Dec. 17, 1947. [105]

[Title of Tax Court and Cause.]

CERTIFICATE

I, Victor S. Mersch, clerk of The Tax Court of the United States, do hereby certify that the foregoing pages, 1 to 105, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecept in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 18th day of December, 1947.

[Seal] /s/ VICTOR S. MERSCH, EMT

Clerk, The Tax Court
of the United States.

[Endorsed]: No. 11818. United States Circuit Court of Appeals for the Ninth Circuit. Annis Van Nuys Schweppe, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review a Decision of The Tax Court of the United States.

Filed December 20, 1947.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 11,818

U. S. Tax Court Docket No. 6415

ANNIS VAN NUYS SCHWEPPE

vs.

COMMISSIONER OF INTERNAL REVENUE

STATEMENT OF POINTS AND DESIGNA-
TION OF RECORD UNDER RULE 19,
SUBDIVISION 6

Pursuant to provisions of subdivision 6 of Rule 19 of the above entitled Court, Petitioner hereby adopts as the statement of points upon which she

intends to rely on appeal, the Assignments of Error included in the petition for review within the Transcript of Record, said petition for review being found at page 32 of the original certified Record herein.

Petitioner further designates for printing the entire record as certified by The Tax Court of the United States to the Clerk of the above entitled Court.

ELMO H. CONLEY,
BERT A. LEWIS,
By /s/ BERT A. LEWIS,
Counsel for Petitioner.

Personal service of the foregoing Statement of Points and Designation of Record under Rule 19, Subdivision 6, is hereby acknowledged this 2nd day of January, 1948.

/s/ THERON L. CANDLE,
Asst. Atty. General.

[Endorsed]: Filed Jan. 12, 1948.

No. 11818.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ANNIS VAN NUYS SCHWEPPE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Upon Petition to Review a Decision of the Tax Court of the
United States.

APPELLANT'S OPENING BRIEF.

FILE

MAR 10 1915

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No. 11818.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ANNIS VAN NUYS SCHWEPPE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

APPELLANT'S OPENING BRIEF.

Jurisdictional Pleadings and Facts.

This case originated with the filing by the petitioner, Appellant herein, in the United States Tax Court of a petition for a redetermination of the deficiency in her Federal Income Tax for the calendar years 1940 and 1941 set forth by the Commissioner of Internal Revenue, Respondent herein, in a Notice of Deficiency dated August 10, 1944. [R. 4.] This petition was properly filed pursuant to the provisions of Section 272 of the Internal Revenue Code. The Tax Court accepted jurisdiction pursuant to the powers granting it in Section 1101 of the Internal Revenue Code and the statutory provisions therein incorporated by reference, and disposed of the matter by rendering an opinion [R. 19] and decision [R. 36] adverse to the Petitioner.

In due course the Appellant filed a petition for review by this Circuit Court of the aforesaid adverse decision of the Tax Court of the United States [R. 37], and this Court has jurisdiction to consider the matter on appeal pursuant to Section 1141(a) of the Internal Revenue Code.

Statement of the Case.

During the tax years here involved the Appellant as a stockholder in the I. N. Van Nuys Building Company received cash distributions from said Company with respect to her stock in amounts totaling \$35,246.38 for the calendar year 1940 and \$24,194.16 for the calendar year 1941. It is conceded that of these amounts \$10,746.62 for the year 1940 and \$3,128.02 for the year 1941 were paid out of the "earnings or profits" of said Company, and are taxable as dividends under Section 115(a) of the Internal Revenue Code. The Commissioner contends that the balance of such distributions was likewise paid out of earnings or profits accumulated since March 1, 1913, and, is, therefore, taxable as a dividend in each of the years involved, whereas, the Appellant claims that there were no further earnings or profits available to cover said balance, and that, therefore, it is not taxable as a dividend, but should be applied in reduction of the basis of her stock in said Company.

The issue thus raised depends on whether or not an increase in the net assets of said Company in the amount of \$400,000, resulting from the elimination as a liability

of the Company of an original indebtedness of that amount to Susanna H. Van Nuys, taxpayer's mother, constitutes "earnings or profits" of said Company. The circumstances surrounding this transaction are not in dispute; they were settled largely by Stipulation in the trial in the Tax Court and it has set them forth fully in its Findings of Fact to which no exception is taken.

The I. N. Van Nuys Building Company was incorporated February 15, 1911, under the laws of the State of California. Most of its original outstanding stock was owned by I. N. Van Nuys, the husband of Susanna H. Van Nuys and the father of the Appellant. The remaining original outstanding stock was owned by Appellant's mother, Appellant, her sister and her brother. [R. 52.] I. N. Van Nuys died February 12, 1912, bequeathing one-half of his stock in said Company to his widow Susanna H. Van Nuys and one-sixth to each of the aforementioned three children. [R. 21.]

The Company owned real property at the Southwest corner of Seventh and Spring Streets in Los Angeles, California, and during the years 1912 and 1913 constructed an office building upon this tract. During the course of construction Susanna H. Van Nuys loaned to the Company the sum of \$400,000, which loan was evidenced by a promissory note dated March 1, 1913, payable three years after its date, with interest at 5% per annum. This note was secured by a mortgage dated March 1, 1913, on said real property which was never recorded. At the time of this loan the stock in the Com-

pany was owned approximately one-half by Susanna H. Van Nuys and one-sixth by each of her three children, one of whom was the Appellant.

Nothing was done concerning the payment or extension of this note when it matured in 1916 nor thereafter, and at various times between 1915 and 1920 Susanna H. Van Nuys told her children that she never intended to enforce collection of the note. In 1919 she gave them all of her stock in the Building Company except one share (which she held until her death), and they, or their immediate families, have owned all of its outstanding stock except this share and one other share ever since.

In May, 1923, Susanna H. Van Nuys died still possessing the note and leaving a Will which mentioned specifically many assets but made no mention of the note. The semi-annual interest installment on said note for December, 1922, was paid, but no interest thereon was paid after that date. When the question was raised regarding the taxability of the note as an asset in the estate of Susanna H. Van Nuys, upon advice of Tax Counsel [R. 102, 103] a friendly action was brought by her Executor against the Company on the note on October 28, 1925. The Company successfully pleaded the Statute of Limitations and secured judgment on November 6, 1925. Thereafter, the matter was litigated in a Federal Court proceeding involving the estate tax liability of the Estate of Susanna H. Van Nuys, in the case of *Title Insurance and Trust Company v. Welch*, 37 F. (2d) 617 (S. D. Cal., 1927), and it was ultimately held that the note

should not be included in the Estate at any value since the Statute of Limitations had run thereon prior to death and it had no value at death. The Federal case decided the issue of the Statute of Limitations upon its merits and specifically refused to accept the previous State Court decision as *res adjudicata*.

Meanwhile on January 21, 1924, long prior to the commencement of the suit to enforce the note, and, of course, prior to the Estate Tax controversy, the Company by appropriate Board action [R. 84] eliminated its liability on the note and transferred the amount to "Surplus paid in." Matters stood thus until 1938, when the Building Company, by appropriate action, first increased its stated capital by \$400,000, thus eliminating the surplus paid in, then reduced the stated capital by \$400,000, thus creating a reduction surplus account in the amount of \$400,000, which, pursuant to the California Corporation law, could then be distributed to the stockholders. The distributions in 1940 and 1941 which are at issue in the present litigation were made from this reduction surplus account.

The Tax Court held that the elimination of the \$400,000 indebtedness increased the earnings and profits of the Company by that amount, and it followed from such a holding that there were sufficient earnings and profits to cover the entire cash distributions received by Appellant from the Company during the years here in question, 1940 and 1941. Consequently, they were taxed in their entirety as dividend income under Section 115(a) of the Internal Revenue Code.

Specification of Errors.

The Appellant assigns as error, the following Conclusions of Law of the Tax Court:

1. The finding that the entire distributions received by petitioner from the aforesaid Company in 1940 and 1941 constituted dividend income.
2. The finding that the earnings or profits of said Company properly allocable to the distributions to the petitioner for the year 1940 exceeded \$10,746.62, and for the year 1941 exceeded \$3,128.02.
3. The finding that the elimination of the aforesaid \$400,000 indebtedness by said Company increased its earnings or profits by \$400,000.
4. The finding of deficiencies for the years 1940 and 1941 in the respective amounts of \$10,110.70 and \$14,850 in lieu of a determination that the deficiencies for said years should be respectively \$750.88 and \$4,500.15.

Summary of Appellant's Argument.

A—The increase in the net assets of the I. N. Van Nuys Building Company resulting from the elimination of the \$400,000 indebtedness did not result in any increase in “its earnings or profits accumulated after February 28, 1913,” and does not, therefore, constitute a source from which dividends under Section 115(a) may be paid.

(1) Congress has specifically limited the source from which dividends can be paid to “earnings or profits accumulated.” Therefore, the ultimate legal issue is whether or not the item here in question is properly so characterized; the issues of whether or not there was a forgiveness of the indebtedness, whether or not there was a contribution to capital, or whether or not there was a gift are merely subsidiary issues of assistance in determining the ultimate legal issue.

(2) An increase in the net assets of a corporation resulting from a gratuity does not constitute “earnings or profits accumulated,” as that phrase is used in Section 115(a) of the Internal Revenue Code.

(3) The \$400,000 increase in the net assets of the I. N. Van Nuys Building Company was gratuitous, not only because the Company furnished no consideration therefor, but also because said increase resulted from the gratuitous intent of Susanna H. Van Nuys toward the Company and its stockholders, her children, and her purposeful inaction to effectuate that intent.

(4) In Tax matters, the law is concerned with the substance of a transaction, and the chain of events which resulted in the \$400,000 increase in the net assets of the Company amounted in substance to a contribution of that amount to the capital of said Company either by Susanna H. Van Nuys or her three children.

(5) Contributions to the capital of a corporation do not constitute “earnings or profits accumulated.”

B—In determining that the increase in the net assets of the I. N. Van Nuys Building Company under the instant circumstances constituted “earnings or profits accumulated” the Tax Court committed a clear error of law which it is the duty of this Court to correct under Section 1141(c)(1) of the Internal Revenue Code.

ARGUMENT.

The Increase in the Net Assets of the I. N. Van Nuys Building Company Resulting From the Elimination of the \$400,000 Indebtedness Did Not Result in Any Increase in "Its Earnings or Profits Accumulated After February 28, 1913," and Does Not, Therefore, Constitute a Source From Which Dividends Under Section 115(a) May Be Paid.

Congress Has Specifically Limited the Source From Which Dividends Can Be Paid to "Earnings or Profits Accumulated." Therefore, the Ultimate Legal Issue Is Whether or Not the Item Here in Question Is Properly so Characterized; the Issues of Whether or Not There Was a Forgiveness of the Indebtedness, Whether or Not There Was a Contribution to Capital, or Whether or Not There Was a Gift Are Merely Subsidiary Issues of Assistance in Determining the Ultimate Legal Issue.

The only time when a corporate distribution is taxable as a dividend is when the Tax Statute says it is. The surprisingly simple answer to the present problem is that the Tax Statute does not say that the distribution here involved is a dividend.

Section 115 of the Internal Revenue Code in effect for the tax year here in question provided in sub-sections (a) and (d) as follows:

"(a) DEFINITION OF DIVIDEND—The term 'dividend' when used in this chapter (except in section 201(c)(5), section 204(c)(11) and Section 207(a)(2) and (b)(3) (where the reference is to dividends of insurance companies paid to policy holders)) means any distribution made by a corporation to its shareholders, whether in money or in other property, (1) out of its earnings or profits accumu-

lated after February 28, 1913, or (2) out of the earnings or profits of the taxable year (computed as of the close of the taxable year without diminution by reason of any distributions made during the taxable year), without regard to the amount of the earnings and profits at the time the distribution was made. * * *

* * * * *

“(d) OTHER DISTRIBUTIONS FROM CAPITAL.—If any distribution made by a corporation to its shareholders is not out of increase in value of property accrued before March 1, 1913, and is not a dividend, then the amount of such distribution shall be applied against and reduce the adjusted basis of the stock provided in Section 113, and if in excess of such basis, such excess shall be taxable in the same manner as a gain from the sale or exchange of property. This subsection shall not apply to a distribution in partial or complete liquidation or to a distribution which, under sub-section (f)(1), is not treated as a dividend, whether or not otherwise a dividend.”

The Respondent contends that portions of the 1940 and 1941 distributions at issue come within sub-section (a) above quoted, whereas, the Appellant claims that they fall within sub-section (d) above quoted. The Appellant thus relies upon the general “catch-all” provision, whereas, the Respondent relies upon the specific provision. Appellant’s Counsel in the Tax Court rested Appellant’s case on the proposition that there had been a gratuitous forgiveness of the indebtedness by Susanna H. Van Nuys during her lifetime which amounted to a contribution to the capital of the corporation. [R. 28, 33.] It is submitted that this was and is a sound position and that the

Tax Court committed a clear-cut error of law in holding otherwise. However, this is not the ultimate issue in the case. Under the above quoted provisions it is not the duty of the Appellant to prove what the questioned item constitutes; it is merely her duty to prove what it does *not* constitute, namely, "earnings or profits accumulated." Congress did not choose to provide that all corporate distributions except in liquidation or except out of capital should be dividends. Rather it reversed the phraseology and specifically limited dividends to distributions out of earnings or profits accumulated. This is the perspective in which the instant facts must be viewed.

To the ordinary man, it would come as something of a shock to be told that a tremendous increase in the net assets of a family corporation under the circumstances here involved would qualify as an "earning" or a "profit." These terms have a well accepted significance in business and legal channels as describing the favorable *results* of a corporation's *operations*. Can there be any question as to the reaction of the Securities and Exchange Commission to a Registration Statement filed by the I. N. Van Nuys Building Company in which it attempted to sell its stock upon the representation, accounting-wise, that this \$400,000 was a part of its "earnings" or its "profits"? It is respectfully submitted that any such characterization would be grossly misleading and inaccurate, and would be summarily rejected by that body. It is precisely as misleading and inaccurate to characterize it thus for tax purposes.

Neither of the words "earnings" or "profits" embraces an *unearned* increase in net assets such as is involved in the instant case. And if we consider the words together so that the phrase itself "earnings or profits" has a single meaning, the conclusion must be the same, for then we are dealing with a well established concept of legal and corporate accounting. And we will show hereafter in this Brief that this concept is generally synonymous with the accounting phrase "earned surplus," which is the very antithesis of an *unearned* increase in net assets.

Furthermore, we cannot overlook the important word "accumulated" as used in the statute. This connotes a recurrent stream of receipts or a building up over the years, rather than in isolated single benefit, such as is involved in the instant case. One never hears the phrase "accumulated capital," "accumulated capital surplus" or "accumulated donated surplus." But the phrases "accumulated earnings" and "accumulated profits" are common ones, simply because the terms "earnings" and "profits" refer to returns from operations, which operations proceed in a rather constant manner. Certainly a \$400,000 increase in net assets such as is involved in the instant case is not the type of increase that is "accumulated." It bears a much closer resemblance to capital which is originally "paid in" than it does to earnings or profits which normally accrue in a steady stream.

The non-recurring character of an item, while not in itself conclusive, has an important bearing on its proper characterization for tax purposes:

Magill, "Taxable Income" (1945), Chapter II, Gifts and Bequests, p. 407:

"Probably the usually applied judicial test—the common understanding of the term income—would lead to an exemption in the case of single, non-recurrent gifts, having no element of compensation. The absence of the *quid pro quo* that is generally associated with income; the infrequency with which they occur, as contrasted with the steady recurrence of most items of income, are responsible for this conclusion. On the other hand, the presence of either of these latter factors might lead to a different result, for reasons which will be discussed hereafter."

It is submitted, therefore, that simply upon a consideration of the clear language of the Statute, there can be no question but that the item here involved does not fall within the statutory phrase "earnings or profits accumulated." However, the Tax Court treated this ultimate issue in a rather cursory manner in the last page of its opinion and spent the rest of its time discussing subsidiary issues such as whether or not there had been a gratuitous forgiveness of the indebtedness, and whether or not there had been a contribution to capital. In the following portions of this Brief we will meet the Tax Court on its own ground and prove that by applying each of its subsidiary tests we arrive at the same answer, namely, that the increase in net assets here involved does not fall within the phrase "earnings or profits accumulated."

An Increase in the Net Assets of a Corporation Resulting From a Gratuity Does Not Constitute "Earnings or Profits Accumulated," as That Phrase Is Used in Section 115(a) of the Internal Revenue Code.

There is apparently no case directly in point on the proposition advanced in the foregoing heading. This is undoubtedly due to the following two reasons:

(1) A gift to a corporation is usually made by a stockholder, and the Commissioner, in his own regulations, as well as the Courts have treated such gifts as "contributions to capital." Since "capital" is the very antithesis of "earnings or profits" such contribution could not possibly qualify under the latter phrase.

(2) The Congressional language, "earnings or profits" clearly indicates "gain derived from capital or labor or both" (classic definition of income in *Stratton's Independence, Ltd. v. Howbert*, 231 U. S. 399, at 415, 58 L. Ed. 285, 34 Sup. Ct. 136 (1913)), that is, a *return* rather than a mere *receipt*. Thus, the proposition of the above heading has been taken for granted, just as it was in that part of the Tax Court's opinion in the instant case which attempted to distinguish the present facts from the Gift involved in the *American Dental* case.

The original 1913 Revenue Act, Public Law 16, 63rd Congress, 38 Stat. 166, used the word "profits" on several occasions. The definition of a dividend as a distribution out of "earnings or profits accrued" was introduced into the Tax Law by the Revenue Act of 1916, Public Law 271, 64th Congress, 42 Stat. 227, Title I, Part 1, Section 2(a). Consequently, it is important to determine the meaning of these words and this phrase at this early period in the history of our Federal Income Tax Statute.

The following pertinent definitions appeared in the 1911 edition of the "Comprehensive Standard Dictionary" published by Funk & Wagnall.

"earning—That which is earned; compensation; wages; commonly in the plural.

profit—1. Any accession of good from labor or exertion; benefit; return. 2. Excess of returns over outlay."

Definitions of these same phrases from 1921 and 1946 editions are similar. While they are somewhat more detailed than the above definition, there is absolutely no change in the fundamental concept that an earning or profit is a *return* from capital or labor rather than a mere *receipt*. The word "profit" used alone in a non-business sense at times has a broad meaning which encompasses any benefit, so that both in the 1911 definition and the subsequent definitions there is included in a subsidiary sense this broad meaning. However, there is no question but that when the term is used in a corporate or business sense, it contemplates clearly a return from the use or disposition of capital or labor, that is, something received in exchange for something furnished, and could not possibly include a gratuitous receipt.

In the 1912-1913 Year Book of the American Association of Public Accounts (the predecessor organization of the American Institute of Accountants), published by the Ronald Press of New York, there is contained at page 176 a report of the Association's Committee on Accounting Terminology. This Report contained a comprehen-

sive definition of various accounting terms and therein the terms "profits" and "earnings" were defined as follows:

"Profits—Profit consists of the surplus remaining over from the employment of capital after defraying all the necessary expenses and outlay incurred in its employment, and after the capital has been replaced or provision made for its replacement" (p. 216).

"Earnings and Income Account—shows the amount of money earned as payment for services, and revenue, and interest from investments—against which the corresponding expense and outlay charges are made" (p. 196).

It will be noted that a "profit" is defined as a surplus resulting from the "employment of capital," the very antithesis of a donation, which has no connection with the employment of capital. Likewise, the term "earnings" is defined as "revenue," "payment for services earned." This definition clearly does not contemplate a donative contribution which is in no sense earned. The very word "earning" of itself and in itself excludes such amounts.

It is equally clear from the authoritative definitions of this same accounting body that gifts and donations should properly be reported as "special surplus" rather than "earned surplus." The 1912-1913 Year Book refers back to the Association's Year Book of 1911 containing a complete discussion of surplus. At page 124 thereof appears the following:

"When any classification of surplus is shown in the statement, the form conveying the most information is (a) 'Surplus, representing accumulated undivided profits remaining at the end of the fiscal year;

(b) Profits and Loss, representing the net profit for the current fiscal year; and (c) Special Surplus, surplus created from other sources.”

Clearly a donation would fall in this latter type of surplus.

This question as to classification of surplus was treated in detail by C. B. Couchman in an article entitled “Classification of Surplus,” Volume 32 of the Journal of Accountancy, October 1921. This paper was read at the annual meeting of the American Institute of Accountants, September, 1921, and was reprinted in “The Accountant,” the official organ of the Society of Chartered Accountants in England. At page 266 of the Journal of Accountancy it was stated:

“It is desirable that accounting reports shall so classify and describe corporate surplus that its source may be readily determinable.

* * * * *

Surplus may come from four sources:

1. From contributions by the proprietorship.
2. From gifts, awards or contributions from others than proprietors where no corresponding service of value is rendered or liability created. * * *
3. From the sale of capital assets.
4. From profits or income earned in the operations of the business.”

There can be no question that the item involved in the present case would not fall in Class 4 above, which is undoubtedly the class of surplus Congress had in mind when it used, rather than the broader word “surplus,” the phrase “earnings or profits.” And there can be no ques-

tion but that the action of the I. N. Van Nuys Building Company in 1924 in crediting the amount of the debt eliminated to "Paid-in Surplus" rather than "Earned Surplus" was a natural and true accounting reflection of it. This is important because, generally, the phrase "earnings or profits" as used in an income tax statute is considered to be synonymous with the general concept of "earned surplus" in accounting circles.

Flint v. Commissioner of Corporations and Taxation, 312 Mass. 204, 43 N. E. (2d) 789 at 791 (1942);

Commissioner of Corporations and Taxation v. Filoon, 310 Mass. 374, 38 N. E. (2d) 693 (1941), at 700 (so holding even as to the broader phrase "accumulated profits").

"The surplus of a corporation may be 'earned surplus' as where it was derived wholly from undistributed profits."

Winkelman v. General Motors Corporation, 44 Fed. Supp. 960, 996 (D. C., N. Y., 1942).

In *Edwards v. Douglas*, 269 U. S. 204, 70 L. Ed. 235, 46 Sup. Ct. 85 (1925), an Estate received during 1917 a substantial dividend. Since the law then in effect taxed this dividend at the rates in effect for the years in which the "profits or surplus" from which the dividend was paid were accumulated, it was claimed that these dividends were taxable at the 1916 rate. This argument was based upon the proposition that even though the corporation had current earnings in 1917 when the dividend was paid, there could be no profits or surplus accumulated until the close of an accounting period, and, therefore, the entire distribution must be charged to 1916 earning. In

holding that the dividend should be taxed at the 1917 rate Justice Brandeis, relying upon many accounting definitions, including those contained in the Committee on Accounting terminology of the American Association of Public Accountants Year Book of 1913, the same reference as is discussed above, said (p. 214):

“Congress did not use the words ‘surplus account’ or ‘undivided profits account.’ Its language is ‘undivided profits or surplus.’ The word ‘surplus’ is a term commonly employed in corporate finance and accounting to designate an account on corporate books. But this is not true of the words ‘undivided profits.’ The surplus account represents the net assets of a corporation in excess of all liabilities including its capital stock. This surplus may be ‘paid-in surplus,’ as where the stock is issued at a price above par. It may be ‘earned surplus,’ as where it was derived wholly from undistributed profits. Or it may, among other things, represent the increase in valuation of land or other assets made upon a revaluation of the company’s fixed property. See *La Belle Iron Works v. United States*, 256 U. S. 377, 385, 65 L. ed. 998, 1005, 41 Sup. Ct. Rept. 528. As used in Section 31(b) the terms undoubtedly means that part of the surplus which was derived from profits which, at the close of earlier annual accounting periods, were carried into the surplus account as undistributed profits. On the other hand, the term ‘undivided profits’ has not acquired in corporate finance and accounting a like fixed meaning. It is not known as designating generally in business an account on the corporation’s books, as distinguished from profits actually earned but not yet distributed. Few business corporations establish an ‘undivided profits’ account. By most corporations

the term 'undivided profits' is employed to describe profits which have neither been distributed as dividends nor carried to surplus account upon the closing of the books; that is, current undistributed earnings."

It will be noted from the above quotation that the Court recognized many types of surplus, specifying several "among others," and that "earned surplus" is derived "wholly from undistributed profits," which in turn is synonymous with "current undistributed earnings." This statement is important not only as indicating that the phrase "earnings or profits" is synonymous with "earned surplus," which embraces only "earnings," generally, but, also as proving that the tax law recognizes several kinds of surplus. Since the increase in assets involved in the present case would not properly fall within "earned surplus" it would not constitute a source from which dividends could be paid.

Under the above authorities, certainly a well accepted accounting principle for determining earned surplus should be controlling in determining earnings and profits unless the purpose of the Tax law requires otherwise. There is nothing in the purpose or legislative history of the tax law indicating that these words or this phrase should have a meaning different than its ordinary and well accepted accounting meaning. On the contrary, the view that a gift is not included in the phrase "earnings or profits" is in complete harmony with the purpose and legislative history of the law.

Finally, one of the recognized authorities on income taxation has discussed this point in detail and has concluded that a gift should not be included in earnings and profits. *Paul*, "Selected Studies in Federal Taxation,"

2nd Series 1938, pages 164, 165, 51 Harv. L. Rev. at 50, 51.

"It is hard to see how, by definition, a gift could be 'earnings or profits.' It has been previously noted in criticism of the dictum in the Cummings case: 'A gift may increase surplus, but according to common parlance a gift has not been earned, and by definition there is in a gift no element of profit.'

A long line of cases starting with *Edwards v. Cuba R. R. Co.*, have established the rule that gifts and capital contributions are not income within the meaning of the Sixteenth Amendment. The mere fact that there is consideration for the payment in the form of duties imposed on the accepting corporation does not alter the principle stated. What is controlling is the absence of obligation to make the gift; it is irrelevant that the 'donor' may receive incidental benefits.

But we need not enter the realm of speculation as to whether it would be possible to impose a tax on dividends from any source whatever other than capital invested. The constitutional metaphysics involved have little bearing on the meaning of the words 'earnings or profits' used in the Act; at any rate, the true question is whether a gratuitous contribution is intended by Congress to be included in the term 'earnings or profits.'

Even though a gift to a corporation should not be income in the constitutional sense, it might become the source of a taxable dividend. The real problem is one of statutory construction. The statutory concept of 'earnings or profits' is undoubtedly wider in scope in some respects than the statutory or constitutional concept of 'net income.' It may also in other respects be narrower, and is narrower, in the opinion of the author, in the case of gifts."

The \$400,000 Increase in the Net Assets of the I. N. Van Nuys Building Company Was Gratuitous, Not Only Because the Company Furnished No Consideration Therefor, but Also Because Said Increase Resulted From the Gratuitous Intent of Susanna H. Van Nuys Toward the Company and Its Stockholders, Her Children, and Her Purposeful Inaction to Effectuate That Intent.

The I. N. Van Nuys Building Company received \$400,000 from Appellant's mother in 1913, which it used in the construction of the office building. It paid 5% per annum for the use of this money through December, 1922. Thereafter, it paid no further interest. In January, 1924, it eliminated its obligation on the note and credited surplus paid in with the entire \$400,000. Its action in so doing was subsequently verified by two court judgments to the effect that the note had outlawed on March 1, 1920. It is obvious, therefore, that this Company furnished no consideration in return for the elimination of this indebtedness.

The Tax Court opinion concludes that the increase in the net assets of the Company was not gratuitous because it resulted from its successful litigation in the Los Angeles Superior Court in which it raised the defense of the Statute of Limitations. The Company's part in this litigation consisted in filing a three page answer on October 30, 1925, in which it set up the defense of the Statute of Limitations. [R. 70.] It may also have participated in the trial on November 4, 1925, and assisted in the preparation of Findings and Judgment rendered on November 6, 1925. It is important to note that this action was commenced on October 28th and was finally decided by judgment nine days later. [R. 59, 80.] What clearer

proof could be asked that this was a friendly suit in which the parts of the opposing parties were in no sense adversary? In view of these facts it is the baldest sort of fiction to claim that such litigation was the generating force behind the acquisition of \$400,000 through the elimination of a \$400,000 indebtedness.

This litigation was not only friendly but was completely abortive. It had no effect whatsoever on the estate tax liability of Appellant's mother's estate. This is perfectly apparent from the opinion of Judge McCormick in the Estate Tax case which followed the litigation in the Los Angeles Superior Court. In holding in favor of the taxpayer, the Court there said:

"It is proper to state that I have not reached this conclusion upon any theory of the application of the doctrine of *res judicata* by reason of the judgment of the state court wherein the note and mortgage were decreed to be legally unenforceable obligations and pecuniarily worthless. I do not believe that the doctrine of *res judicata* can be applied in this case as against the United States or its collector of internal revenue. The parties to the two causes are different. The United States does not stand in privity with any party in the state court action. However, we should consider the record evidence of the state court action on the question as to the market value and money worth of the note at the time of Mrs. Van Nuys' death, to wit, May 1, 1923.

"Considering all the evidence, I am persuaded by it to give the taxpayer the benefit of the doubt that exists in my mind as to the taxable value of the note. I do not believe that the interest payment checks in evidence constitute *ex proprio vigore* such direct and unqualified admissions of indebtedness by the maker

of the note, and show a clear acknowledgment of its willingness to pay the note indebtedness so as to remove the bar on the statute of limitations that had already run against the note and the debt that it evidences. See *Clunin v. First Federal Trust Co.*, 189 Cal. 248, 207 P. 1009. This uncertainty, coupled with the direct evidence in the record as to the worthlessness of the note, leads me to conclude that it should not be taxed in the estate of Mrs. Van Nuys."

Title Insurance and Trust Company v. Welch, 37 F. (2d) 617 (S. D. Cal. 1927).

Thus, the litigation which was originated for the sole purpose of verifying for estate tax purposes the conclusion that the note had outlawed [R. 102, 103] did not even accomplish that purpose. And it could be of no significance for any other purpose because prior to its commencement the Corporation had taken its position by ceasing to pay interest and by eliminating the indebtedness and crediting paid-in surplus. Furthermore, both the entire ownership of the Corporation and the entire ownership of the residuary estate of Susanna H. Van Nuys, into which the note as an asset would fall, were in her three children in practically identical proportions.

It is clearly settled as a matter of Tax law, even in connection with *bona fide* adversary litigation, that such litigation does not alter the tax character of the right involved or receipt obtained. Litigation does not create rights; it adjudicates rights and obligations which have arisen from the occurrence of facts prior to litigation. Thus, in tax matters if the right litigated is a capital item any recovery thereon must be reflected as such whether or not litigation is necessary; and if it is an income item, it must be reflected as such. This is so ele-

mental as to require no extended citation of authority. One close analogy will suffice. This is furnished by the cases involving the tax character of a recovery of a claimed heir under a Will Contest or similar heirship litigation. In such a situation the heir, or asserted heir, makes the legal claim and in certain instances prosecutes it in the courts, thus expending considerable time and money in so doing. If he wins the claim or if the matter is ultimately compromised with him receiving a part of the estate, this payment is received tax free as a legacy.

Lyeth v. Hoey, 305 U. S. 188, 83 L. Ed. 119, 59 Sup. Ct. 155 (1938);

U. S. v. Gavin, 159 F. (2d) 613 (C. C. A. 9th, 1947).

These cases have specifically rejected the argument that the receipts of the heir are income because they are realized as the result of his "bargaining position." In so doing, they have stressed the fact that it is the "heirship which underlies the entire compromise," just as in the instant case it is the running of the Statute of Limitations which underlies the successful litigation.

These will contest cases cannot be reconciled with the Tax Court's position in the instant case that the successful litigation of the Statute of Limitations question created the \$400,000 increase in net assets. There is also another large body of law clearly contrary to this position. This has been developed in cases in which railroads and other organizations in dealing with their customers and employees have either overcharged the customers or underpaid the employees. It is uniformly held that, when a certain period of time expires and the customer or employee does not make a claim for the amount due, said

amount must be included in the taxable income of the debtor corporation. The increase in net assets resulting under such circumstances is properly treated as taxable income for the following reasons, none of which is present in the instant case:

(1) The failure of the employee or customer to claim the amounts results purely from his neglect and in no sense from a donative intention toward the debtor corporation or its stockholders.

(2) The items arise in business transactions between the obligor and its customers or employees and merely represent adjustments in the consideration furnished by the various parties. That is, the transactions involve considerations on both sides and the questioned amounts merely affect the amount of the consideration.

(3) The transactions are commonly experienced in the businesses involved and constitute a regular flow of benefits to the obligor corporation which are so constant that it in a sense relies upon them as the source of its income.

(4) The items involve mere adjustments in previous accounting entries affecting operations and income rather than capital. Thus, the subsequent adjustment should be reflected likewise. For example, in the case of accumulated wages, these wages have previously been deducted as expenses on the corporation's books. Obviously, when that liability is eliminated the correction should increase income.

While in an early case it was held that the income so arising should be accounted for in the year when the Statute of Limitations ran on the claim against the obligor, *Great Northern Railway Company v. Lynch*, 292 Fed. 903 (D. C. Minn. 1921), the later cases have held that

the year of expiration of the Statute is not necessarily controlling.

G. M. Standifer Construction Corporation, 30 B. T. A. 184 (1934). If after a reasonable period expires without the filing of a claim, the Company credits the amount to its profit and loss, this is the proper year for including the amount in income regardless of whether or not the Statute has run at that time.

Chicago Rock Island and Pacific Railway v. Commissioner, 47 F. (2d) 990 (C. C. A. 7th, 1931);

Charleston and W. C. Railway v. Burnet, 50 F. (2d) 342 (D. C. App. 1931).

However, the taxpayer may not wait an unreasonable length of time to enter the credits, and, if he does, the Commissioner may treat the items as income prior to their having been reflected as such on the taxpayer's books.

North American Coal Corporation v. Commissioner, 97 F. (2d) 325 (C. C. A. 6th, 1938).

These cases unanimously support two fundamental propositions:

(1) Under no circumstances is it necessary or even proper to wait for a suit upon the obligation and the successful defense of the Statute of Limitations before giving tax cognizance to the elimination of the liability.

(2) The debtor's action in eliminating the liability and crediting the appropriate surplus account is conclusive unless it is too late. It has never been held to be too early, and it could not possibly be held to be too early in a case such as the present one when the entry in 1924 was made long after the Statute of Limitations had run.

Because of the differences between these cases and the instant one outlined above and more fully discussed hereafter, the circumstances of the instant case would not warrant the reflection of the increase in net assets here involved as a taxable income item. But these differences strengthen rather than lessen the force of the above authorities on the question of the appropriate time at which the elimination should be given that tax cognizance which the circumstances require. In the instant case, at the time the corporation transferred the amount to paid-in surplus, there was greater certainty of the finality of its action than in any of the cases above cited. This, because such action in the instant case represented not only the decision of the obligor, after the Statute had run, but also, the decision of the obligee, since she had stated she did not intend to collect, and since the controlling officers of the obligor were, as residuary legatees, the beneficial owners of the interest of the obligee in the obligation after her death. Therefore, the applicable authorities unanimously require that the increase in net assets presently involved should be given tax cognizance in any event not later than 1924. At that time the litigation had not even been commenced. Obviously, therefore, it cannot affect the tax character of the transaction nor constitute a consideration for something already a closed transaction for tax purposes.

Again, suppose in the instant case there had been no action in the Superior Court of Los Angeles County on the note. Would the Government say that because of this, its elimination as a liability on the books of the corporation was erroneous, and that even today for tax purposes the note must be treated as a liability of the corporation? The question answers itself. Consequently, the litigation

thought to be the source of the benefit by the Tax Court does not even satisfy the elemental and requisite “but-for” rule which we know in the field of Tort law, for even if it had not occurred the result would have been the same.

Finally, the Tax Court’s view in this regard is completely contrary to the opinion of Judge McCormick in the Estate Tax litigation above referred to. If the litigation in the Los Angeles Superior Court created the increase in net assets presently involved, then, prior to that time, there must have existed an obligation on the note and a correlative right. This right must have had a value at the date of death which was several years prior to the litigation. Yet the Federal District Court in the Estate Tax case held that because of the expiration of the Statute of Limitations no valuable right existed *at the date of death*.

It is respectfully submitted, therefore, that in view of the above authorities, the conclusion is inescapable that the litigation in which the Statute of Limitations was successfully pleaded constituted neither a generating source of the increase in net assets nor a consideration therefor, and, the I. N. Van Nuys Building Company furnished no consideration whatsoever for said increase. This alone is sufficient under the rule of *Helvering v. American Dental Company*, 318 U. S. 322, 87 L. Ed. 785, 63 Sup. Ct. 577 (1943) (discussed more fully hereinafter) to constitute the transaction a gift for tax purposes. But in the instant case the Appellant’s case is much stronger than this. We have thus far considered merely the position of the obligor. Let us now examine the facts with reference to the obligee.

The Tax Court has found as a fact that the note “was not surrendered to the Building Company by her (Susanna

H. Van Nuys) during her lifetime nor cancelled, nor the indebtedness represented thereby gratuitously forgiven by her.” [R. 23.] This finding is absolutely correct since both of the verbs there used, “cancelled” and “forgiven,” connote overt action. The note was not marked cancelled, it was not destroyed, it was not delivered to the maker, there was no written instrument delivered to the maker or to anyone forgiving the note, and there was not even any oral *action* of forgiveness operating *in praesentia*. But what of the holder’s inaction? Other findings of the Tax Court make it perfectly clear that the inaction of Susanna H. Van Nuys in failing to take any steps to collect or extend the note during her lifetime and in permitting the Statute of Limitations to run without any action to preserve her rights either before or after it ran was prompted by a gratuitous intent towards the Company and its stockholders. These findings are as follows:

1. The note matured in 1916 and no action concerning its complete or partial payment or renewal was ever taken by Susanna H. Van Nuys between that time and the date of her death some seven years later. [R. 23.]

2. At various times throughout this period (the Tax Court language is “as early as 1915 and as late as 1920”) [R. 22, 23] Susanna H. Van Nuys told various members of her family that she did not intend to enforce the collection of the note.

3. The corporate obligor was owned entirely by the obligee and her immediate family. [R. 22.]

4. Susanna H. Van Nuys in her Will, which speaks as of her death and is the final evidence of her intention, made mention of many specific pieces of property but made no mention whatsoever of this note. [R. 23.]

The donative intent thus evidenced, and the inactivity pursuant thereto ultimately (we believe when the statute ran, but just when is not important) created rights in the corporate beneficiary just as complete and irrevocable as the ordinary gift completed by delivery—rights just as complete and irrevocable as would have been created by an actual formal cancellation of the indebtedness as a contribution to the capital of the Corporation.

Tax laws are practical, and tax consequences are based upon the substance of transactions. Thus the Gift Tax law is not concerned with niceties of overt action of delivery and the like, but is concerned only with the “shifting of economic interests.”

Burnet v. Guggenheim, 288 U. S. 280, 77 L. Ed. 748, 53 Sup. Ct. 369 (1919).

Thereunder, it is clearly settled that a taxable gift may occur as the result of passivity as well as activity.

In *Commissioner v. Allen*, 108 F. (2d) 961 (C. C. A. 3, 1939), a minor had made a gift when there was no gift tax law in effect. After the effective date of the Gift Tax Act the minor attained his majority and the period during which he could disaffirm the gift expired without his having taken any action to disaffirm. It was held that this failure to disaffirm on the part of the minor constituted a taxable gift, the Court saying at page 966:

“It was the change of legal rights and the shifting of economic benefits that came about with the termination of the minor’s power to revoke which Congress was at liberty, under the Constitution, to tax as a transfer effected at that time * * *

Likewise in *Helvering v. McCormack*, 135 F. (2d) 294 (C. C. A. 2, 1943), a taxable gift was held to have been effected by the failure of a Trustee to exercise his power to withdraw accumulations, the Court saying at page 296:

“We agree that, in so far as the Trustee had power during 1936 to withdraw the accumulations and refrained from doing so, he at that time made a gift to the child.”

Applying the same test of shift of economic interest in the present situation as was applied under the Gift Tax law under the authorities above cited, it is clear that a taxable gift occurred when the Statute of Limitations ran. At this point, the Corporation acquired the right simply by electing to assert the defense of the Statute of Limitations, to keep the entire \$400,000 without any obligation to return it. It thus acquired legal power at its election to eliminate the \$400,000 indebtedness. This shift in legal rights certainly amounts to a shift in economic interests.

There is no room in the practical Tax law for the nice legal theory sometimes advanced that the Statute of Limitations affects merely the remedy and not the right, particularly in a case such as the present where the sole stockholders of the corporation were the children of the obligee who would be the legal recipients of the estate upon her death. The Gift Tax could not function adequately at all if such legal magic could prevent such a clear shift of economic interests from constituting a taxable gift. The instant situation has been specifically recognized as a likely setting for a taxable gift. Thus the

House Committee Report on the 1932 Gift Tax law, H. Rep. No. 708, 72nd Congress, 1st Sess. pp. 27, 28, C. B. 1939-1, Part 2, p. 477, states:

“A transfer by A. to a Corporation owned by his children would constitute a gift to the children.”

The Case law supports this rule:

Frank B. Thompson, 42 B. T. A. 121 (1940),
(Remanded per Compromise in which tax deficiency substantially reduced C. C. A. 6th 1942,
42-1 U. S. T. C. Par. 10, 166);

Robert H. Scanlon, 42 B. T. A. 997 (1940).

It would undoubtedly be applied to the instant facts under the present Gift Tax Law (there was no Federal Gift Tax prior to 1924). Otherwise, a wealthy taxpayer with a large estate to be distributed could, through passive inaction with reference to the Statute of Limitations, shift her entire wealth to her children without incurring any Gift Tax. And, if there is a gift for gift tax purposes, the benefit must be gratuitous for income tax purposes. No reason or principle dictates otherwise.

Finally, what is the effect of the Corporation's continuing to pay interest on the note, after it had outlawed, to December, 1922, the last interest payment date prior to the death of Susanna Van Nuys? Legally, of course, since the statute had run, the Corporation could not have been required to make these interest payments and in that sense they were purely voluntary. The Corporation deducted these payments as interest. Probably they were not properly deductible since the indebtedness referred to in the interest deduction provision of the Internal Revenue Code, Section 23(b) means an “enforceable obligation.”

Mertens, "Law of Federal Income Taxation," Vol. 4, Section 26.04, page 544.

The more accurate characterization of these payments would be that they were dividends to Mrs. Van Nuys, or dividends to the children and gifts by them to her. Dividends paid need not be pro-rata according to stock-holding, and the Gift Tax Regulations provide that "a transfer of property by a Corporation to B is a gift to the latter from the stockholders of the Corporation. If B himself is a stockholder, the transfer, not being a distribution from earnings or in liquidation to which B is entitled as a stockholder, is a gift to him from the other stockholders." Reg. 108, Sec. 86.2(a)(1).

However, the classification as interest or dividends under the laws then applicable was not of any great consequence. The normal tax on corporations during the years 1921 and 1922 was 10% and 12½% respectively, whereas, the normal tax for individuals for these years on a taxpayer in the brackets of Susanna H. Van Nuys was 8%. Revenue Act 1921, Section 210(a) and 230. Under the law then in effect dividends, unlike interest, were not subject to normal tax in the hands of the recipient stockholder. Thus, there was little net loss to the Government in characterizing these payments as interest rather than dividends, and probably no attention was given to the matter by the taxpayer or the Commissioner.

The fact that the corporation deducted interest paid on the note after it had outlawed is related directly not to the question at issue in the instant case, but rather to the

question of whether or not Mrs. Van Nuys reported the payments as interest income. There is nothing to indicate otherwise, and, undoubtedly, she did so. The income tax question directly related to the ultimate issue in the instant litigation is whether or not Susanna H. Van Nuys or her estate took a bad debt or loss deduction for income tax purposes for the loss of the \$400,000, or whether they were entitled to do so under the Income Tax law. The answer to such question is very clearly in the negative, and the interest payments subsequent to the notes outlawing have no effect on it.

It is firmly established that where an obligee, for personal reasons, makes no attempt to collect on an obligation against a solvent obligor, the obligee may not take any tax deduction as a loss or a bad debt with respect to that obligation.

S. R. 3833, IV-1 C. B. 153 (1925) (The principal stockholder of a corporation holding a note against it permitted the Statute of Limitations to run without collecting on the note. It was held on several alternative grounds that the stockholder was entitled to no bad debt or loss deduction.)

H. D. Lee Mercantile Company v. Commissioner, 79 F. (2d) 391 (C. C. A. 10th, 1935). In denying the deduction the Court stated:

“It is a startling proposition that a taxpayer may, for reasons of his own, decline to enforce a valid claim against a responsible concern and thus assert that he has sustained a business loss which the Government should share. * * * The Statute of

Limitations can not be used to convert a valid claim against a responsible debtor into a deductible loss on a worthless debt. * * *

Thom v. Burnet, 55 F. (2d) 1039 (App. D. C. 1932). In denying a deduction for worthless debts of a son-in-law, the Court said on page 1040:

“But where the taxpayer, because of family ties or personal relations between himself and his debtor, is not willing to enforce a payment of his debt, in whole or in part, he is not thereby entitled to deduct it from his income tax return as worthless.”

Charles C. Mathews, 8 T. C. No. 156 (1947);

E. J. Ellisburg, 9 T. C. 463 (1947);

C. B. Hayes, 17 B. T. A. 86 (1929).

It is obvious under these authorities that the family relationship and donative intent involved in the instant case would preclude any income tax deduction to Mrs. Van Nuys or her estate as a result of the loss of this \$400,000 asset, regardless of the fact that interest payments were continued for some time after the note had outlawed. In fairness, it must follow that these same fundamental characteristics of the transaction must be given effect in determining the income tax status of the increase on the books of the obligor.

In any event, the most that the payment of interest to the last date prior to the obligee's death can mean—and this is a most extreme supposition in Respondent's favor—is that both Mrs. Van Nuys and the corporation intended

that her gratuitous intent toward it and her children should not be finally effective until her death. What is the significance of such a conclusion? It merely means that the effective date of the gratuity is postponed. Certainly, there is nothing to indicate that Mrs. Van Nuys' gratuitous intent ceased some time between 1920 and the date of her death. On the contrary, the fact that her Will mentioned many assets but made no specific mention of the note is a clear reaffirmance of the continuation to the date of her death of such a gratuitous intent. Can there be any question but that when the Corporation eliminated the liability and credited its paid-in surplus in 1924 this action was perfectly consistent with the donative intent of Mrs. Susanna H. Van Nuys? Obviously not. Can it be said that the obtaining of a judgment to the effect that the Statute of Limitations had run, thwarted her intent? Obviously not. It was perfectly consistent with her donative intent. Thus, the indisputable fact remains that, regardless of the time when for tax purposes the indebtedness is regarded as having been eliminated,—whether in March of 1920, when the debt outlawed, on May 1, 1923, when Susanna H. Van Nuys died, in January, 1924, when the Corporation eliminated the indebtedness, or in November, 1925, when the Los Angeles Superior Court held the Statute barred the indebtedness,—the result was consistent with the donative intent of Susanna H. Van Nuys, whose passivity in permitting the statute to run was the real source of the increase in the Corporation's net assets.

In Tax Matters, the Law Is Concerned With the Substance of a Transaction, and the Chain of Events Which Resulted in the \$400,000 Increase in the Net Assets of the Company Amounted in Substance to a Contribution of That Amount to the Capital of Said Company Either by Susanna Van Nuys or Her Three Children.

As early as 1918, the Treasury Department promulgated the following regulations (Regulations 45, 1918 and 1920 Edition, Article 51):

“Forgiveness of indebtedness.—The cancellation and forgiveness of indebtedness is dependent on the circumstances for its effect. It may amount to a payment of income or to a gift or to a capital transaction. If, for example, an individual performs services for a creditor, who in consideration thereof cancels the debt, income to that amount is realized by the debtor as compensation for his services. If, however, a creditor merely desires to benefit a debtor and without any consideration therefor cancels the debt, the amount of the debt is a gift from the creditor to the debtor and need not be included in the latter’s gross income. If a stockholder in a corporation which is indebted to him gratuitously forgives the debt, the transaction amounts to a contribution to the capital of the corporation. * * *”

This provision was continued *verbatim* in Regulations 62 under the Revenue Act of 1921 and has been contained in each subsequent regulation (slightly modified as to the second example commencing in 1934) down to the present time, the present regulation on this subject being Regulation 111, Section 29.22(a) 13.

The first two sentences of this regulation state a general principle. There then follow three examples which

are intended to explain and illustrate the principle but are obviously not intended to be exclusive. The last example is the situation of a stockholder who gratuitously forgives a debt owed him by his corporation.

The Tax Court in the instant case simply found that there was no gratuitous forgiveness of the indebtedness by the stockholder, Mrs. Van Nuys, and then concluded, without any further discussion, that, because of this, there was no contribution to the corporation's capital. We submit that the instant issue does not admit of such cavalier treatment. Certainly the instant facts more closely resemble the two examples given in this regulation as constituting a gift or contribution to capital than the example given as constituting the receipt of income.

The only proper way to determine whether the present case falls under the principle of this regulation as illustrated by the example of a stockholder gratuitously forgiving his corporation's debt, is to ascertain the reason for the origin of the principle. This reason is very clearly set forth in the opinion of Justice Learned Hand, in the case of *U. S. v. Oregon-Washington R. and Nav. Co.*, 251 Fed. 211 (C. C. A. 2, 1918), which is one of the leading cases on the subject and probably the case upon which the original regulation above quoted was based. In this case, a parent corporation released a debt against its wholly owned subsidiary in the amount of \$6,000,000 and it was claimed that this constituted income to the subsidiary within the meaning of the language of the corporate excise tax law of 1909, which tax was

measured by net income. In holding that this action constituted a contribution to capital, as distinguished from the receipt of income, Judge Hand stated (pp. 212 and 213 (emphasis supplied)):

“However, the tax though it includes income ‘from all sources,’ nevertheless includes ‘income’ only, and the meaning of that word is not to be found in its bare etymological derivation. Its meaning is rather to be gathered from the implicit assumptions of its use in common speech. The implied distinction, it seems to us, is between permanent sources of wealth and more or less periodic earnings. Of course, the term is not limited to earnings from economic capital *i. e.*, wealth industrially employed in permanent form. It includes the earnings from a calling, as well as interest, royalties, or dividends, though in the case of corporations this may be of slight importance. Yet the word unquestionably imports, at least so it seems to us, the current distinction between *what is commonly treated as the increase or increment from the exercise of some economically productive power of one sort or another, and the power itself*, and it should not include such wealth as is honestly appropriated to what would customarily be regarded as the capital of the corporation taxed.

“Now it seems to us hardly arguable that the cancellation of the debt in question was not in the category of capital. The corporation had just commenced its business; the cancellation of the debt was a means of contribution to its capital account, quite as though the money had been contributed by the stockholder only to enhance the value of his stock. The financial relief, so given, will, it is true, be eventually reflected in the income, since the defendant will no longer be entitled under the act to deduct the interest on the debt; but that only brings out more clearly its char-

acter as capital contribution. We regard the difference as precisely equivalent to the difference between the cancellation of a portion of the mortgage bonds and a cancellation of an equal proportion of their coupons. Common usage would, if we are right, unfailingly allocate the first as an increase in capital assets and the second as an increase in income. That, as we view it, is the proper test of the act."

Apparently, in the above case, the parent had actively "released" its debt. This, however, was not the basis of Judge Hand's decision. The basis of the decision was (1) that the benefit to the subsidiary did not result from "the increase or increment from the exercise of some economically productive power of one sort or the other," that is, it furnished no consideration therefor, and (2) that the principal, a capital item, was forgiven, rather than interest, an income item.

The *Oregon-Washington* case above discussed is the forerunner of a series of cases, which unanimously hold that where a stockholder cancels or forgives an indebtedness from his corporation to him for no consideration, the transaction amounts to a contribution to the corporation's capital and does not constitute income to the corporation. *Commissioner v. Auto Strop Safety Razor Company, Inc.*, 74 F. (2d) 226 (C. C. A. 2, 1934); approved by the Supreme Court in *Helvering v. American Dental Company*, 318 U. S. 322 (1943). *American Cigar Company v. Commissioner*, 66 F. (2d) 425 (C. C. A. 2, 1943), certiorari denied 290 U. S. 699, 78 L. Ed. 601, 54 S. Ct. 208 (1933) (Dictum: Actual holding denied bad debt deduction to parent corporation). *Carroll-McCreary Company, Inc. v. Commissioner*, 124 F. (2d) 303 (C. C. A. 2, 1941). Two of the aforesaid cases applied the rule

even where the debt involved was for an unpaid expense item of the debtor corporation which had been deducted for income tax purposes by it in previous years. The Eighth Circuit decision of *Helvering v. Jane Holding Corporation*, 109 F. (2d) 933 (C. C. A. 8, 1940), casts some doubt on these two cases, but that doubt has largely been removed by the later Supreme Court decision on a similar set of facts in the *American Dental Company case*, 318 U. S. 322, 87 L. Ed. 785, 63 S. Ct. 577 (1943).

In this case certain creditors agreed to cancel a part of back interest against a debtor corporation and a lessor creditor agreed to cancel a part of unpaid rent for back years which was owed him by the corporate debtor. The latter had taken both items as deductions for tax purposes in the years when the interest and rent had accrued, and the Commissioner claimed that it realized taxable income when these items were forgiven. In holding to the contrary the Supreme Court said (pp. 330, 331):

“Gifts, however, is a generic word of broad connotation, taking coloration from the context of the particular statute in which it may appear. Its plain meaning in its present setting denotes, it seems to us, the receipt of financial advantages gratuitously.

* * * * *

“The Board of Tax Appeals decided that these cancellations were not gifts under sec. 22(b)(3). It was said:

“‘No evidence was introduced to show a donative intent upon the part of any creditor. The evidence indicates, on the contrary, that the creditors acted for purely business reasons and did not forgive the

debts for altruistic reasons or out of pure generosity.’

“With this conclusion we cannot agree. We do not feel bound by the finding of the Board because it reached its conclusions, in our opinion, upon an application of erroneous legal standards. Section 22(b)(3) exempts gifts. This does not leave The Tax Court of the United States free to determine at will or upon evidence and without judicial review the tests to be applied to facts to determine whether the result is or is not a gift. The fact that the motives leading to the cancellations were those of business or even selfish, if it be true, is not significant. The forgiveness was gratuitous, a release of something to the debtor for nothing, and sufficient to make the cancellation here gifts within the statute.”

It is important to note the following contrast in the facts between the instant case and those involved in the *American Dental* decision. (1) In the latter the cancellation was made by creditors who had no donative intent toward the debtor but only a business interest in it. (2) These creditors had no interest in stock in the debtor nor did their immediate families hold any such interest. (3) The debts forgiven were income items in that they represented previously accrued interest and rent and had been deducted by the debtor in previous income tax returns. Notwithstanding these facts, the Supreme Court held that since the debtor in the *American Dental* case had given nothing for the release, that is, furnished no consideration, the cancellation was gratuitous, and, there-

fore, a gift. In fact this was the only respect in which the *American Dental* case satisfied the tests set forth in the *Oregon-Washington* case, *supra*. Surely, if the elimination of the indebtedness in the *American Dental* case was gratuitous the elimination of the indebtedness in the instant case must be so.

In the *American Cigar Company* case, *supra*, the parent had made considerable advances to its subsidiary when the subsidiary was in financial difficulties and there was little hope that the parent would recoup the advances. In denying a bad debt deduction to the parent, the Court said: "The advances were, in reality, contributions to the capital of the Havana Company (the subsidiary) in which the petitioner was a stockholder." The Court cited the *Oregon-Washington* case, *supra*. It will be noted that, in the *American Cigar Company* case, there was no formal cancellation or forgiveness of indebtedness. Rather there was a transaction which, in form, amounted to nothing more than the creation of an indebtedness, which was in substance held to be a contribution to capital. Certainly, the form of the present action is more analagous to the above quoted regulation than was the form of the transaction in the *American Cigar Company* situation. And it is in intra-family relationships such as is involved in the instant case where the courts are most inclined to disregard the form of the transaction and give effect to its substance for tax purposes. The law is summarized thus in Magill, "Taxable Income," (1945 Edition) pp. 434, 435, where in discussing the effect of a transfer of real estate by a widow to her children in exchange for a promised life

annuity of \$5,000 per year, the author concludes that such a transaction should be treated as a gift for tax purposes:

“The preceding chapter affords many instances of decisions by courts that transactions, in the form of contracts for valid consideration, may be treated as gifts for tax purposes, and vice versa. The fact that, in the instant case, the parties were closely related, and the consideration was not in fact adequate, would lead to the conclusion that the widow did not make an annuity contract, but rather a gift, conditioned upon the payment to her of a sum equivalent to the annual income of the farm.”

In the present case, the money was contributed to the company at the time of its origin and was used in the erection of the prime capital asset of the corporation. The indebtedness was, in effect, cancelled (see the discussion in Part IVA3 hereinabove, pp 22-37) by Susanna Van Nuys, a stockholder, at the time the statute ran. It was undoubtedly her intention, as well as that of her children who were then the remaining stockholders, that these funds should remain permanently as a part of the capital of the corporation since they were tied up in the building. Of prime importance, the corporation furnished no consideration for the cancellation of the indebtedness.

Thus, the present situation is exactly within the rationale of the *Oregon-Washington* case, which is the cornerstone of the regulation on the subject and the case law which has followed. All of the considerations mentioned in Part IVA3 of this brief, pp. 22-37 apply with equal force

hereto demonstrate that the present situation amounts in substances to a contribution to the capital of the I. N. Van Nuys Building Company.

There are numerous cases involving claimed deductions where a transaction has been held to amount in substance to a contribution to the capital of the corporation although in form it was something entirely different. These decisions have shown no reluctance to regard the substance rather than the form, nor reluctance to apply the rule when only one stockholder was involved and there was in no sense pro rata contributions.

Jenkins v. Bitgood, 101 F. (2d) 17 (C. C. A. 2, 1939). (One stockholder purchased securities from his corporation at a considerable amount in excess of their then market value.)

In Re Park's Estate, 58 F. (2d) 965 (C. C. A. 2, 1932).

Surely justice requires that a similar view would be applied from the standpoint of the debtor in the instant case, particularly since the other shareholders were the children of the creditor.

Contributions to the Capital of a Corporation Do Not Constitute "Earnings or Profits Accumulated."

Since "Capital" is the very antithesis of "earnings or profits" there can be no question as to the soundness of the above proposition. Suffice to say that this circuit has very recently so held. *United National Corporation v. Commissioner*, 143 F. (2d) 580 (C. C. A. 9, 1944).

In Determining That the Increase in the Net Assets of the I. N. Van Nuys Building Company Under the Instant Circumstances Constituted "Earnings or Profits Accumulated" the Tax Court Committed a Clear Error of Law Which It Is the Duty of This Court to Correct Under Section 1141(C)(1) of the Internal Revenue Code.

Under Section 1141(c) of the Internal Revenue Code, upon a petition to review a decision of the Tax Court, this Court is required "if the decision of the Board is not in accordance with the law, to modify or reverse the decision of the Board, with or without remanding the case for a rehearing, as Justice may require."

In the instant case all of the facts are agreed. The entire argument heretofore appearing in this brief has been based upon the acceptance in full of the Findings of Fact of the Tax Court. The sole question here is one of law, not only because there are no facts in dispute, but also because the question involves the interpretation of a specific provision of the statute which governs the instant case. Furthermore, the Tax Court's decision is contrary to numerous well settled principles of law.

Fortunately, it is not necessary to discuss in detail the ramifications of the *Dobson* case. 320 U. S. 489, 88 L. Ed. 248, 64 S. Ct. 239 (1943). This circuit has recently reversed the Tax Court in deciding that an increase in net assets resulting from a redemption of stock constituted "earnings or profits," saying: "All the facts are agreed. The sole question here is one of law." *United National Corporation v. Commissioner*, 143 F. (2d) 580 (C. C. A. 9, 1944). Furthermore, it is clearly settled that where there is no dispute on the facts, a determination of whether or not an elimination of indebtedness constitutes a gratui-

tous non-taxable item rather than a non-gratuitous income item, is a question of law upon which the Tax Court's decision is not binding. *Helvering v. American Dental Co.*, 318 U. S. 331, 87 L. Ed. 785, 63 S. Ct. 577 (1943), reversing the Tax Court. *Commissioner v. Jacobson*, 164 F. (2d) 594 (C. C. A. 7, 1947), reversing the Tax Court.

Indeed in the *American Dental* case the Tax Court had found as a fact that the cancellation of indebtedness there involved was not gratuitous, but the Supreme Court reversed the finding on the ground that the Tax Court had applied erroneous legal standards, just as it did in the instant case. Thus, were it necessary, the *American Dental* case would permit us in the instant case to argue the soundness of any conclusions of fact that the Tax Court had made bearing on the gratuitous character of the elimination of the indebtedness here present. However, the Findings of Fact of the Tax Court are not broad enough to require us to go to this end in the instant case.

Conclusion.

The instant case involves a very simple situation. Susanna H. Van Nuys owned \$400,000 in cash which was transferred to the I. N. Van Nuys Building Company in return for its note. This money was invested by the Company in a building and the earnings on that building have been included in the company's income and earnings and profits ever since. The beneficial ownership of the \$400,000 has been shifted from Susanna H. Van Nuys to her three children. There has been at most a transmission of this capital asset, and "taxable income is not multiplied by the mere transmission of the capital asset producing it." *Magill*, "Taxable Income" (1945), p. 441.

Of course we cannot ignore the corporate entity, nor the fact that the transaction was originally set up as a loan, and we have conceded in our argument that originally a debtor-creditor relationship was created between Susanna H. Van Nuys and the Corporation. However, this merely means that when the capital asset was transmitted—at a later date than otherwise because of the original debtor-creditor relationship—the transmission had a dual character. That is, the corporation, as a separate entity, realized an increase of \$400,000 in its net assets and the three children as principal stockholders therein received a corresponding pro rata increase in their net worth through the enhancement in the value of their stock. *But the fact remains that neither the three children nor the corporation has earned this sum.* It was earned some time prior to 1913 at which time it was capital in the hands of Susanna H. Van Nuys.

The principle which controls the present case was determined long ago in 1918 when Learned Hand in the *Oregon-Washington Nav.* case, *supra*, decided that for tax purposes the capital of a corporation was not limited to the original stockholders' contribution classified in form as capital, but embraced an increase in the net assets in a corporation which amounted in substance to a donation by a stockholder of further capital to the venture. The increase was thus not income, and by the same token, was not an earning or a profit. This is as it should be, and Judge Hand's opinion has grown in stature with the years. The most recent pertinent pronouncement of the Supreme Court on the subject in the *American Dental* case not only cites with approval the cases stemming from that early opinion but also extends the principle far beyond the scope of the facts involved in the original case or the facts involved in the present case.

The Tax Court in deciding adverse to the taxpayer in the instant case gave lip service to this principle but held it did not apply because there has been no *formal, active* cancellation of indebtedness; that is, the donation had not been effected in exactly the same way as it had in the prior cases applying the principle. It thus ignored the true meaning of the principle and the *ratio decidendi* of the *Oregon-Washington case* and necessarily held that the principle had been crystallized into a set form, and was forever thus confined. This is a holding exactly opposite not only to the actual decision in that case, but to that bright concept that this thing we call law is something vital, which grows as reason, justice and intelligent statutory interpretation require.

The Tax Court not only committed a clear cut error of law on the ultimate issue, but also committed numerous errors of law on the subsidiary issues. Its decision should be reversed with the mandate that none of the \$400,000 increase in net assets presently involved constitutes "earnings or profits accumulated" of the I. N. Van Nuys Building Company.

Respectfully submitted,

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No. 11818

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

ANNIS VAN NUYS SCHWEPPE, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

**ON PETITION FOR REVIEW OF THE DECISION OF THE TAX
COURT OF THE UNITED STATES**

BRIEF FOR THE RESPONDENT

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In the United States Circuit Court of Appeals for the Ninth Circuit

No. 11818

ANNIS VAN NUYS SCHWEPPE, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

*ON PETITION FOR REVIEW OF THE DECISION OF THE TAX
COURT OF THE UNITED STATES*

BRIEF FOR THE RESPONDENT

OPINION BELOW

The findings of fact and opinion of the Tax Court (R. 19-35) are reported in 8 T. C. 1224.

JURISDICTION

This case involves deficiencies in income tax, first asserted by respondent in the amount of \$10,110.78 for 1940 and \$20,605.75 for 1941 by notice of deficiency dated August 10, 1944. (R. 9-15.) Taxpayer's petition for redetermination was filed with the Tax Court within ninety days thereafter on November 4, 1944 (R. 2), pursuant to Section 272 of the Internal Revenue Code. The decision of the Tax Court finding deficiencies for the years 1940 and 1941 in the respective amounts of \$10,110.78 and \$14,850 was en-

tered on August 28, 1947. (R. 36.) Taxpayer's petition for review was filed on November 14, 1947 (R. 4), pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

QUESTION PRESENTED

In deciding that cash distributions to taxpayer from the I. N. Van Nuys Building Company in 1940 and 1941 were dividends and not distributions from capital, did the Tax Court commit reversible error?

STATUTE AND REGULATIONS INVOLVED

The pertinent parts of the statute and Regulations are set out in the Appendix, *infra*.

STATEMENT

The facts as stipulated by the parties (R. 43-84) and as contained in the Findings of Fact and Opinion of the Tax Court (R. 19-35) may be summarized as follows:

1. *The Contemporary Facts Basing the Assessment.*—The I. N. Van Nuys Building Company is a California corporation which owns and holds the property commonly known as the Van Nuys Building located at the southwest corner of Seventh and Spring Streets in Los Angeles. (R. 21-22, 44-45). The stock of the Building Company is owned in approximately equal one-third shares by the three living children of I. N. Van Nuys and Susanna H. Van Nuys (both deceased), one of whom is the taxpayer; the others being Kate Van Nuys Page and J. B. Van Nuys. (R. 21-22, 44, 52.) In 1940, taxpayer received a cash distribution of \$35,246.38 on her

Building Company stock, and in 1941 she received a similar distribution in the amount of \$24,149.16. (R. 22.) On the Building Company books, these distributions were charged as follows:

	Total distributions paid	Charged "earned surplus"	Charged "reduction surplus"
1940.....	\$35,246.38	\$10,746.62	\$24,499.76
1941.....	24,149.16	3,128.02	21,021.14

(R. 27, 51.)

In her returns for 1940 and 1941, taxpayer included as taxable dividends received only the amounts charged by the Building Company to "earned surplus" account. Respondent has added to taxpayer's income the amounts received which were charged on the Building Company books to "reduction surplus" account, and the sole issue in the case is whether or not such amounts are dividends taxable to the recipient in the years involved. (R. 27-28, 44, 50-51.)

In the years prior to and including 1937 dividends paid to the stockholders of the Building Company were charged against "earned surplus" account. In 1938 and years thereafter the distributions made to stockholders were first charged against the "earned surplus" account until that account was exhausted, and the balance was then charged against "reduction surplus" account. The "earned surplus" account included all of the Building Company's earnings and profits available for distribution to stockholders during the period in question except the amount of \$400,000 reflected in "reduction surplus" account,

which, taxpayer claims, is not part of such earnings and profits. (R. 27, 50.)

2. *Origin and Nature of the \$400,000 Receipt From Which Dividends Were Paid.*—The Van Nuys Building was constructed in about 1912–1913. During the course of construction Susanna H. Van Nuys, taxpayer's mother, loaned to the Building Company \$400,000 on a promissory note dated March 1, 1913, payable three years after its date with interest at five percent. (R. 22, 45, 53.) The note was secured by a mortgage on the building property, dated March 1, 1913, which was never recorded. (R. 22, 46, 59–69.) I. N. Van Nuys, taxpayer's father, died February 12, 1912 (R. 45), and from January 1, 1913, to June 25, 1913, the estate of I. N. Van Nuys held 12,750 out of 13,250 shares of the Building Company's stock (R. ~~44~~, 52). Susanna H. Van Nuys and the three children then each owned about 100 of such shares. (R. 52). After June 25, 1913, Susanna H. Van Nuys owned one-half of the Building Company stock, and each of her three children, the present stockholders, owned one-sixth thereof. (R. 21, 45.) In February 1919, Susanna H. Van Nuys gave such children in equal shares all of the Building Company stock except one share, which she held until her death on May 1, 1923. (R. 22–23, 46.) Between 1915–1920, Susanna H. Van Nuys stated to various members of her family including her son, J. B. Van Nuys, who was then secretary of the Building Company, that she did not intend to enforce collection of the note. (R. 23.) She made no attempt during her lifetime to

collect the note. However, it was not surrendered to the Building Company, nor cancelled, nor was the indebtedness represented thereby gratuitously forgiven by her. (R. 23.) Interest on the note was paid semi-annually to Susanna H. Van Nuys by the Building Company up to and including December 31, 1922, but no amount was ever paid on principal and no interest was paid after December 31, 1922. The Company deducted such interest as expense on its books and income tax returns. The Company was solvent at all times. The \$400,000 item was carried on the Company books as a liability until January 21, 1924, at which time it was, pursuant to a resolution of the board of directors reciting that the note "has become outlawed and is no longer enforceable", transferred to "Surplus Paid-In" account. (R. 23, 47.)

The note was returned as being of no value in the Susanna H. Van Nuys estate tax return. Respondent in 1925 tentatively determined a deficiency based on a value of \$400,000 for the note. (R. 24, 47.) Thereupon, the executor of decedent's will commenced an action on the note and mortgage in the California Superior Court against the Building Company, which successfully pleaded the statute of limitations and obtained judgment on November 6, 1925, to the effect that the claim was barred. (R. 24-25, 47-48, 54-80.) A deficiency based on inclusion of such \$400,000 note in the estate was nonetheless asserted (R. 25, 48), and was paid and a suit for refund was commenced in the District Court for the Southern District of California. (R. 26, 48-49.) The court held in this action that the

note should not be taxed in decedent's estate, and entered judgment in favor of the executor for a tax refund on July 18, 1929. (*Title Insurance & Trust Co. v. Welch*, 37 F. 2d 617 (~~D. C.~~ Cal.)). (R. 26, 49.)

On September 13, 1938, pursuant to resolutions of the board of directors of the Building Company, the \$400,000 "Surplus Paid-In" was transferred on the Company books to "Stated Capital", and from the latter account to "Reduction Surplus" account, with provision for its distribution to shareholders from time to time as later determined. (R. 26-27, 49-50, 80-84.) The taxability as dividends of distributions from this account in 1940 and 1941 is the sole issue. (R. 21, 44.)

SUMMARY OF ARGUMENT

It is clearly taxpayer's burden to show that the amounts received by her from the Building Company in 1940 and 1941 were not taxable dividends, but return of capital. To maintain that position, taxpayer asserts that a \$400,000 receipt of the Building Company, realized upon the extinction of a liability in that amount to Susanna H. Van Nuys, is not part of the Company's earnings or profits because it was a gift to the Company from Mrs. Van Nuys. Taxpayer's position involves a complete reconstruction, for present tax purposes, of the facts as reflected for tax purposes by the Building Company between 1920 and 1925. For affirmative evidence of the gift, taxpayer shows only oral statements made by Mrs. Van Nuys that she did not intend to collect. This is not sufficient, either on the element of intention or delivery, to establish a gift. Neither Mrs. Van Nuys

nor the corporation took action to consummate her (assumed) wish. On the contrary, the corporation acknowledged its obligation up to the time of the death of Susanna H. Van Nuys by paying interest regularly, and took the appropriate income tax deductions. The accretion to the corporation was realized after her death, by corporate action successfully establishing in the state and federal courts that the obligation was barred by the statute of limitations; and by the elimination of the obligation from the Company books. True, the accretion was not in the ordinary course of business, e. g., a receipt from rents; it resulted from a cost-free discharge of an obligation. Such an accretion is nonetheless economic gain to the corporation and a part of its earnings or profits, payments from which are divided ^{paid} to stockholders rather than return of capital.

Furthermore, the sole issue in the case turns on the evidence before the Tax Court concerning the tax nature of a receipt of \$400,000 by the Company over twenty years ago, which taxpayer claims was a gift constituting capital of the corporation, and which the Tax Court, after a thorough review of the evidence, found not a gift, but an accretion to earnings or profits. The problem in the case, as the Tax Court says, "is largely one of fact." The case certainly involves no generalizing principle of law. Rather, it involves the proper characterization of a business transaction for income tax purposes, within the special competence of the Tax Court under the *Dobson* rule.

ARGUMENT

I

Taxpayer has not sustained the burden of showing that the \$400,000 receipt of the Building Company was not earnings or profits of the Company

At the outset, it is abundantly clear that taxpayer has the burden of proving error in the respondent's determination in this case. The respondent's ultimate finding that taxpayer received a dividend out of earnings or profits is presumptively correct, and must be clearly overcome. *Faris v. Helvering*, 71 F. 2d 610, 611 (C. C. A. 9th), certiorari denied, 293 U. S. 584; *Cranson v. United States*, 146 F. 2d 871 (C. C. A. 9th), certiorari denied, 326 U. S. 717; *Golden State T. & R. Corp. v. Commissioner*, 125 F. 2d 641, 643 (C. C. A. 9th). Dividends paid in the ordinary course of business are taxable income to the recipient "in the absence of convincing evidence to the contrary." *Ayer v. Commissioner*, 7 B. T. A. 324, 329, affirmed, 26 F. 2d 547 (App. D. C.). There is a presumption that any corporate distribution, other than one in liquidation, is a dividend. *Rheinstrom v. Conner*, 125 F. 2d 790, 795 (C. C. A. 6th).

To support this burden, taxpayer has first shown that the source of the distributions in question was a \$400,000 receipt of the Building Company, reflected in "Surplus Paid-In" account between January 21, 1924, and September 13, 1938, and thereafter reflected in "Reduction Surplus" account on the books of the Company. The book treatment of this receipt (e. g., in the nature of capital, or in the nature of earnings

or profits) is, of course, of no moment. *Bazley v. Commissioner*, 331 U. S. 737, 741; *Baboquivari Cattle Co. v. Commissioner*, 135 F. 2d 114, 116 (C. C. A. 9th); *Faris v. Helvering*, *supra*. Taxpayer has, however, shown that the Building Company had insufficient other earnings or profits available for distribution to its stockholders, and argues here, as in the Tax Court, that the \$400,000 receipt was a gift (contribution to capital)¹ to the corporation, not constituting part of its earnings or profits. The first question, then, is as to the nature of this receipt.

In its inception, the \$400,000 item was clearly a corporate obligation to Susanna H. Van Nuys, secured by note and mortgage dated March 1, 1913. (R. 22.) Judging by the actual happenings during the period 1913 through 1923, it was a corporate obligation until the death of Mrs. Van Nuys. The note and mortgage existed during that period, unsurrendered and uncanceled; the indebtedness to Mrs. Van Nuys remained unchanged on the corporate books as a liability; interest at five per cent was paid by the Company semi-annually to Mrs. Van Nuys through December 31, 1922 (last payment due before her death on May 1, 1923) *and was deducted as expense on the Company books and income tax returns*. (R. 23.) The loan from Mrs. Van Nuys was carried as a liability on the books until January 21, 1924. The tax benefit to this

¹ The nominal holding of Mrs. Van Nuys in the Building Company (one share) during the years in question was an insufficient proprietary interest to support a contention that she made a "contribution to capital." *Cf. George Hall Corp. v. Commissioner*, 2 T. C. 146, 147.

“family corporation” (Pet. Br. 11) from the facts as then reflected is clear and unquestioned; as taxpayer says (Br. 34):

The normal tax on corporations during the years 1921 and 1922 was 10% and 12½% respectively, whereas, the normal tax for individuals for these years on a taxpayer in the brackets of Susanna H. Van Nuys was 8%. Revenue Act 1921, Sections 210 (a) and 230.

Taxpayer now finds it advantageous to ask the Court for a 1948 reconstruction of the 1920 facts, asserting (Br. 32-35) that the obligation was really outlawed by the statute of limitations on March 1, 1920, and interest payments thereafter “dividends to Mrs. Van Nuys, or dividends to the children and gifts by them to her.” A long course of dealing, and \$60,000 of interest paid and deducted by the Building Company, are, under taxpayer’s claim, to be reconstructed now in support of the theory that the \$400,000 receipt was a gift in 1920 to the Company. The principle of *Burnet v. Commonwealth Imp. Co.*, 287 U. S. 415, 419, is clearly applicable, that having enjoyed the benefits which resulted from carrying the obligation as such on the corporate books, the stockholder is in no position to urge that transactions as reflected thereon were otherwise “in substance”; and that taxpayer, a participant in the 1920 arrangements, must accept the present tax disadvantages. Cf. *Moline Properties v. Commissioner*, 319 U. S. 436, 439. It is the Government, not the taxpayer, who “may look at actualities and upon determination that the form employed for doing business or carrying out

the challenged tax event is unreal or a sham may sustain or disregard the effect of the fiction as best serves the purposes of the tax statute." *Higgins v. Smith*, 308 U. S. 473, 477.

Again, judging by what actually happened, the Building Company was freed of its legal obligation by legal action taken after the death of Mrs. Van Nuys. Her estate returned the Building Company obligation as without value for federal estate tax purposes. On September 17, 1925, a tentative deficiency was asserted by respondent based in part on a value of \$400,000 for the note. On October 28, 1925, the Title Insurance and Trust Company commenced action on the note in the California Superior Court. (R. 24.) On October 30, 1925, the Building Company filed its answer, specifically pleading the statute of limitations as the sole defense to the suit. (R. 24, 70-73.) On November 6, 1925, the Court found the note and mortgage barred by such statute "as set forth in the defendant's answer herein." (R. 76, 78.) This finding was sustained, despite expressed uncertainty, by the District Court in a suit for taxes paid on the value of the note. *Title Insurance & Trust Co. v. Welch*, 37 F. 2d 617, 618. (S. D. Cal.) In neither action was there any assertion that the \$400,000 was a gift, or a contribution to capital, during Mrs. Van Nuys' lifetime.

For proof of a gift, taxpayer relies on family discussions between 1915 and 1920, in which Mrs. Van Nuys stated "that she did not intend to enforce the collection of the note." (R. 23.) The proof on taxpayer's claim of a consummated gift to the

corporation goes no farther, except for negative facts such as the failure of Mrs. Van Nuys to mention the note in her will, and "inactivity", which despite taxpayer's claims (Br. 30-33), certainly form no adequate basis for affirmative inferences. In *Botchford v. Commissioner*, 81 F. 2d 914, 916 (C. C. A. 9th), this Court in an employer-employee compensation case stated the California requisites for a completed gift: donor's intent, delivery, and acceptance; and also stated the general rule that there is no presumption in favor of a gift, but the burden of proving a gift is upon the donee. In *Helvering v. Amer. Dental Co.*, 318 U. S. 322, 323, strongly relied on by taxpayer, the evidence showed a closed and completed transaction of gift in 1937, by the creditor's forgiveness in that year of a portion of back rent and acceptance of a reduced amount, and appropriate book entries in the same year reflecting the gift made. Taxpayer cites no authorities holding that oral statements such as those here relied on are sufficient to prove either a consummated gift, or a contribution to capital.

The book treatment of the item for corporate and tax purposes reflected not a gift but an obligation, until after the death of Mrs. Van Nuys on May 1, 1923. There was no modification of the terms of the note and mortgage by contract in writing, or by executed oral agreement, within Section 1698 of the California Civil Code (Deering, 1937 ed.); nor was there an extinction of the obligation by destruction or cancellation of the written contract, within Section

1699 of the same Code. Assuming that a general purpose to cancel the obligation existed, Mrs. Van Nuys did not in fact carry her desires into action, and as the Tax Court succinctly puts it (R. 32):

The very fact that interest was paid by the corporation each year on the note to Mrs. Van Nuys and that the corporation continued to carry it upon its books as bills payable shows that she had not in fact forgiven the indebtedness and had not made a capital contribution of it to the corporation. * * * Moreover when the executor of the estate of Susanna H. Van Nuys brought an action on the note in the California court and the Building Company pleaded only the statute of limitations as a defense we think it indicated that the parties believed in the existence of the debt. There was no claim in that suit that Mrs. Van Nuys had forgiven the indebtedness to the Building Company during her lifetime.

At most, then, we have an unexecuted desire—an unconsummated wish—on the part of Mrs. Van Nuys, to benefit the Building Company or her children. It is sufficient answer to taxpayer's "form-substance" argument (Br. 38-46) that on looking through "form" we find certain action taken, and certain action foregone during the period in question, with tax consequences then reflected in accordance with the facts. In determining the effect of a transaction for tax purposes the courts consider what was actually done and not what might have been done. *United States v. Phellis*, 257 U. S. 156; *Remington*

Rand, Inc. v. Commissioner, 33 F. 2d 77 (C. C. A. 2d), certiorari denied, 280 U. S. 591; *Eaton v. White*, 70 F. 2d 449 (C. C. A. 1st); *Clemmons v. Commissioner*, 54 F. 2d 209 (C. C. A. 5th).

It is certain that the Building Company realized, at some time more than twenty years ago, a receipt of \$400,000. Taxpayer earnestly contends (Br. 11-13) that the non-recurring, "unearned" character of the receipt, and the fact that it did not result from corporate operations (i. e., rents) should by definition take the receipt out of the category of "earnings or profits", citing (Br. 15-20) various accounting concepts of this term. However, "earnings or profits", in the tax sense, does not necessarily follow corporate accounting concepts. *Commissioner v. Wheeler*, 324 U. S. 542, 546. A variety of receipts non-recurring in character are plainly "earnings or profits", e. g., from life insurance proceeds (*Cummings v. Commissioner*, 73 F. 2d 477 (C. C. A. 1st)), and the proceeds from the cancellation of indebtedness, which is "included in earnings, not merely because it operates to make available to the stockholders a larger amount for the payment of dividends, but because it constitutes a profit in the generally accepted sense of the word." Rudick, "Dividends" and "Earnings or Profits" Under the Income Tax Law, 89 U. of Pa. L. Rev. 865, 883 (1941). On the facts as reflected by the Building Company and the Van Nuys family, including taxpayer, during the period in question, the receipt was no more and no less than a cost-free cancellation of corporate indebtedness, or extinguishment

of corporate obligation. As the Tax Court found (R. 34):

When the corporation was relieved of the debt of \$400,000 its free assets were correspondingly increased. This enhancement was due to the judgment of the California court in the suit on the note brought by the executor of the estate of Susanna H. Van Nuys wherein the court upheld the contention of the Building Company that the statute of limitations in effect in California was a bar. It was not until the judgment of the California court that the right of the noteholder was finally determined because the only defense to the payment of the note was the plea of the bar of the statute of limitations which must be affirmatively pleaded and could have been waived. * * * By virtue of the judgment of the California court the amount of \$400,000 was released to the general uses of the Building Company and its assets, previously offset by the obligation of the note, were made available to the Building Company. This benefit, we think, is "earnings and profits" within the meaning of section 115 (a). * * *

The Tax Court citations to this finding include: *United States v. Kirby Lumber Co.*, 284 U. S. 1, 3 (purchase of bonds at less than par makes assets available which were previously offset by obligations, and this is an accession to corporate income); *Helvering v. Amer. Chicle Co.*, 291 U. S. 426, 430 (discharge of liability for less than par results in taxable income); *Walker v. Commissioner*, 88 F. 2d 170 (C. C. A. 5th), certiorari denied, 302 U. S. 692 (release of partner's indebtedness occurred in 1930 when

account was credited and note surrendered, and constituted taxable income then, not in prior year of "agreement").

It is well recognized that a corporation may realize taxable income as a result of the running of the statute of limitations on a corporate liability, or lapse of time indicating unlikelihood of collection by the creditor. *Chicago, R. I. & P. Ry. Co. v. Commissioner*, 47 F. 2d 990, 992 (C. C. A. 7th), certiorari denied, 284 U. S. 618; *Charleston & W. C. Ry. Co. v. Burnet*, 50 F. 2d 342 (App. D. C.); *North American Coal Corp. v. Commissioner*, 97 F. 2d 325 (C. C. A. 6th); 2 Mertens, Law of Federal Income Taxation, Section 11.26.

Moreover, in the present case, while it seems clear enough that income was similarly realized by the Building Company, the decision below may be supported on a further ground.² The statutory concept

² The distinction between taxable income of a corporation and earnings or profits of a corporation available for distribution is well stated in *Ayer v. Commissioner*, 12 B. T. A. 284, 287, as follows:

"* * * some income or profit free from tax in the hands of a corporation is, nevertheless, taxable to a stockholder upon distribution. Dividends and stock of domestic corporations, interest on bonds and obligations of States and municipalities, and statutory exemptions are not a part of the statutory net income of a corporation, but are nevertheless a part of its earnings or profits and may form a part of ordinary dividends which are taxable when received by the stockholders. * * *

No cases are found supporting taxpayer's thought that "earnings or profits" does not include all income items. Of course, expenses or losses which are not allowed as deductions in computing taxable net income, but which clearly deplete the income available for distribution to the stockholders "* * *" must be deducted in computing earnings or profits." Rudick, *op. cit. supra*, p. 887.

of "earnings or profits" is not limited to "income" items; and payments from funds traceable to tax-free receipts are often taxable dividends because the receipts are earnings or profits. Thus, in the *Cummings* case, *supra*, the life insurance proceeds were distributed pursuant to resolutions, where the evidence "plainly" showed that such receipts were intended to benefit the stockholders. The Court, however, held the distributions to be from Section 115 (a) earnings or profits, and said (p. 480):

"Earnings or profits" as used in this section must mean the same as "gains or profits" in section 22 (a), and a gift to a corporation would be a gain. Nor would it be overstating the transaction here to say that the company having invested in the insurance policies by paying the premiums, the receipts therefrom over and above the premiums were profits. If these funds, however derived, belonged to the company where received, they would go to increase its surplus, and it cannot be seriously argued that the surplus funds in the hands of the company over and above its stock liability are not the earnings or profits contemplated by the section.

See also, Paul, Ascertainment of "Earnings or Profits" for the Purpose of Determining Taxability of Corporate Distributions, Selected Studies in Federal Taxation (Second Series), pp. 149-199. A gift to a corporation, though not income, might well be considered "earnings or profits", since the Section 22 (b) (3) statutory exemption of gifts from gross income is an exemption "granted to the corporation,

not to its stockholders", the corporation being "not merely a conduit" and the identity of the gift being "lost in the distribution". Rudick, *op. cit. supra*, p. 881. As the Court observed in *Helvering v. American Dental Co.*, *supra*, pp. 329-330, citing cases, "the broad import of gross income in Section 22 (a) admonishes us to be chary of extending any words of exemption beyond their plain meaning."

This issue, however, is not presented in the present case, because the facts do not establish a consummated gift from Mrs. Van Nuys to the Building Company. The failure of taxpayer to establish such a gift in the present case makes it unnecessary to consider *United States v. Oregon-Washington R. and Nav. Co.*, 251 Fed. 211 (C. C. A. 2d); *Helvering v. American Dental Co.*, *supra*; *American Cigar Co. v. Commissioner*, 66 F. 2d 425 (C. C. A. 2d), certiorari denied, 290 U. S. 699, and similar cases cited by taxpayer, in all of which clear and definite steps were taken to consummate gifts, or capital contributions. The present facts show a not unusual type of economic gain realized by the Building Company, normally and conventionally held to be taxable income in nature, and an accession to earnings or profits. It makes no present difference whether the \$400,000 receipt was realized in 1920, when the statute of limitations ran on the obligation; in 1924, when the liability was removed from the Company books; or in 1925, when the California court held the obligation barred by the statute of limitations.

II

The Tax Court determination is one of fact, and of tax accounting, with warrant in the record. It is not further reviewable

The review of the record and the statement of the issue in connection with Point I, *supra*, sufficiently defines the problem of this case as one turning only on the evidence before the Tax Court concerning the tax nature of a \$400,000 receipt by the Building Company over twenty years ago. Taxpayer, before the Tax Court, unsuccessfully stressed certain circumstances tending to indicate that the receipt was a gift, or a contribution to capital, and brings the same argument to this Court. There are numerous other circumstances looking the other way, and it is the function of the Tax Court to choose. *Wilmington Co. v. Helvering*, 316 U. S. 164, 167-168. The Tax Court has specifically found (R. 31) that the problem in this case "is largely one of fact."

In *Commissioner v. Estate of Bedford*, 325 U. S. 283, the Tax Court had held (1 T. C. 478) that a corporate distribution of cash pursuant to a tax-free recapitalization was out of earnings and profits (despite book surplus deficit), and taxable as a dividend rather than as a capital gain. The Second Circuit reversed (144 F. 2d 272). In reinstating the Tax Court determination, the Supreme Court said as to the substantive issue in the case (p. 292):

* * * the matter is not wholly free from doubt. But these doubts would have to be stronger than they are to displace the informed

views of the Tax Court. And if the case can be reduced to its own particular circumstances rather than turn on a generalizing principle we should feel bound to apply *Dobson v. Commissioner*, 320 U. S. 489, and sustain the Tax Court.

See also, *Bazley v. Commissioner, supra*, where the Court affirmed a determination that debentures distributed were a dividend taxable as earned income under Sections 22 (a), 115 (a) and (g) of the Code, finding no "misconception of law" involved in the case.³

It is the function of the Tax Court to "examine relevant facts of business to determine whether or not they come under statutory language" (*John Kelley Co. v. Commissioner*, 326 U. S. 521, 529), and the Tax Court's determination should be accepted unless it involves a "clear-cut question of law" (*id.*, p. 527). Nor should the Tax Court's decision be disturbed by "treating as questions of law what really are disputes over accounting." *Dobson v. Commissioner*, 320 U. S. 489, 499.

³ In the Third Circuit Court of Appeals decision in *Bazley v. Commissioner, supra*, reported in 155 F. 2d 237, the court refers to the Tax Court's decision that a certain distribution was out of earnings and profits as a "factual conclusion" (p. 241). And in *Adams v. Commissioner*, 155 F. 2d 246, 248 (C. C. A. 3d), affirmed, 331 U. S. 737, with *Bazley v. Commissioner, supra*, the Third Circuit speaks of a similar question, whether a certain distribution was essentially equivalent to a taxable dividend, as follows:

"In the last analysis, this case turns on a dispute over proper accounting procedure for income tax collection purposes. We are not at liberty to treat as a question of law such a dispute. It is patently controlled by the Dobson rule."

As in *Wilkins v. Commissioner*, 161 F. 2d 830, 832-833 (C. C. A. 1st), the taxpayer in the present case "contends in substance that the Tax Court erred in its characterization of a business transaction for income tax purposes." This presents no clear-cut question of law, but the question of classification of the given transaction for tax purposes, turning on its own facts. See also, *Clark v. Commissioner*, 162 F. 2d 677, 680 (C. C. A. 8th), and *Kirschenbaum v. Commissioner*, 155 F. 2d 23, 24 (C. C. A. 2d), certiorari denied, 329 U. S. 726, where the *Estate of Bedford* rule was applied to a determination of the Tax Court that a certain redemption of stock was equivalent to a dividend—despite Second Circuit precedents to the contrary—because "a plainly erroneous legal proposition does not emerge from the record."

The present case, as in *Seattle Brewing Co. v. Commissioner*, 165 F. 2d 216 (C. C. A. 9th), and the companion case of *Commissioner v. Rainier Brewing Co.*, 165 F. 2d 217 (C. C. A. 9th)—

* * * presented to the Tax Court "hybrid questions of mixed law and fact [and] their resolution because of the fact element will * * * afford little concrete guidance to future cases." We hence do not consider the petitioner's contention that "the facts found fall short of meeting statutory requirements." * * * [citing *Trust of Bingham v. Commissioner*, 325 U. S. 365, 370, and *Choate v. Commissioner*, 324 U. S. 1].

Rehearing was sought in the *Seattle Brewing Co.* case because "the Tax Court did no more than construe the terms of an undisputed contract," and was denied because factual inferences "were an essential part of the adjudicating process of the Tax Court in reaching its decision." *Seattle Brewing Co. v. Commissioner*, decided February 18, 1948 (1948 P-H, par. 72, 373). Rehearing was sought in the *Rainier Brewing Co.* case "because the probative facts relied upon by the Tax Court are undisputed," and was likewise denied; this Court stressing the "rule of general applicability" requirement of *Trust of Bingham v. Commissioner*, 325 U. S. 365; *John Kelley Co. v. Commissioner*, *supra*; *Boehm v. Commissioner*, 326 U. S. 287, and *Commissioner v. Scottish American Co.*, 323 U. S. 119. *Commissioner v. Rainier Brewing Co.*, decided February 18, 1948 (1948 P-H, par. 72, 372).

See also, *Wilcox v. Commissioner*, 137 F. 2d 136, 138 (C. C. A. 9th); *Hirsch v. Commissioner*, 124 F. 2d 24, 28 (C. C. A. 9th); *Botchford v. Commissioner*, *supra*.

CONCLUSION

The decision of the Tax Court should be affirmed.

Respectfully submitted.

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APRIL 1948.

APPENDIX

Internal Revenue Code:

SEC. 22. GROSS INCOME.

(a) *General Definition*.—"Gross income" includes gains, profits, and income derived from
* * * dividends * * *

* * * * *

(e) *Distributions by Corporations*.—Distributions by corporations shall be taxable to the shareholders as provided in section 115.

* * * * *

(26 U. S. C. 1940 ed., Sec. 22.)

SEC. 115. DISTRIBUTIONS BY CORPORATIONS.

(a) *Definition of Dividend*.—The term "dividend" when used in this chapter (except in section 203 (a) (3) and section 207 (c) (1), relating to insurance companies) means any distribution made by a corporation to its shareholders, whether in money or in other property, (1) out of its earnings or profits accumulated after February 28, 1913, or (2) out of the earnings or profits of the taxable year (computed as of the close of the taxable year without diminution by reason of any distributions made during the taxable year), without regard to the amount of the earnings and profits at the time the distribution was made.

(b) *Source of Distributions*.—For the purposes of this chapter every distribution is made out of earnings or profits to the extent thereof, and from the most recently accumulated earnings or profits. Any earnings or profits accumulated, or increase in value of property accrued, before March 1, 1913, may be distributed exempt from tax, after the earnings and profits accumulated after February 28,

1913, have been distributed, but any such tax-free distribution shall be applied against and reduce the adjusted basis of the stock provided in section 113.

* * * * *

(d) [as amended by Sec. 214 (b) of the Revenue Act of 1939, c. 247, 53 Stat. 862] *Other Distributions from Capital*.—If any distribution made by a corporation to its shareholders is not out of increase in value of property accrued before March 1, 1913, and is not a dividend, then the amount of such distribution shall be applied against and reduce the adjusted basis of the stock provided in section 113, and if in excess of such basis, such excess shall be taxable in the same manner as a gain from the sale or exchange of property. This subsection shall not apply to a distribution in partial or complete liquidation or to a distribution which, under subsection (f) (1), is not treated as a dividend, whether or not otherwise a dividend.

(26 U. S. C. 1940 ed., Sec. 115.)

Treasury Regulations 103, promulgated under the Internal Revenue Code:

SEC. 19.115-1. *Dividends*.—The term “dividend” for the purpose of Chapter 1 (except when used in sections 203 (a) (3) and 207 (c) (1) thereof) comprises any distribution in the ordinary course of business, even though extraordinary in amount, made by a domestic or foreign corporation to its shareholders out of either—

(1) earnings or profits accumulated since February 28, 1913, or

(2) earnings or profits of the taxable year computed without regard to the amount of the earnings or profits (whether of such year or accumulated since February 28, 1913) at the time the distribution was made.

The earnings or profits of the taxable year shall be computed as of the close of such year, without diminution by reason of any distributions made during the taxable year. For the purpose of determining whether a distribution constitutes a dividend, it is unnecessary to ascertain the amount of the earnings and profits accumulated since February 28, 1913, if the earnings and profits of the taxable year are equal to or in excess of the total amount of the distributions made within such year.

* * * * *

SEC. 19.115-2. *Sources of Distributions in General*.—For the purpose of income taxation every distribution made by a corporation is made out of earnings and profits to the extent thereof and from the most recently accumulated earnings and profits. * * *

* * * * *

SEC. 19.115-3. [as amended by T. D. 5024, 1940-2 Cum. Bull. 110, 112; T. D. 5059, 1941-2 Cum. Bull. 125-126] *Earnings or profits*.—In determining the amount of earnings or profits (whether of the taxable year, or accumulated since February 28, 1913, or accumulated prior to March 1, 1913) due consideration must be given to the facts, and, while more bookkeeping entries increasing or decreasing surplus will not be conclusive, the amount of the earnings or profits in any case will be dependent upon the method of accounting properly employed in computing net income. For instance, a corporation keeping its books and filing its income tax returns under sections 41, 42, and 43 on the cash receipts and disbursements basis may not use the accrual basis in determining earnings and profits; a corporation computing income on the installment basis as provided in section 44 shall, with respect to the installment transactions, compute earnings and profits on such

basis; and an insurance company subject to taxation under section 204 shall exclude from earnings and profits that portion of any premium which is unearned under the provisions of section 204 (b) (5) and which is segregated accordingly in the unearned premium reserve.

Among the items entering into the computation of corporate earnings or profits for a particular period are all income exempted by statute, income not taxable by the Federal Government under the Constitution, as well as all items includible in gross income under section 22 (a) or corresponding provisions of prior Revenue Acts, Gains and losses within the purview of section 112 or corresponding provisions of prior Revenue Acts are brought into the earnings and profits at the time and to the extent such gains and losses are recognized under that section (see section 19.115-12). Interest on State bonds and certain other obligations, although not taxable when received by a corporation, is taxable to the same extent as other dividends when distributed to shareholders in the form of dividends.

No. 11818

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

ANNIS VAN NUYS SCHWEPPE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

APPELLANT'S REPLY BRIEF.

GIBSON, DUNN & CRUTCHER, and
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No. 11818
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United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

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Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

APPELLANT'S REPLY BRIEF.

I.

Facts and Issue Involved.

There is no material discrepancy between the statement of facts in Appellant's Opening Brief and Respondent's Brief. Furthermore, both parties are in agreement that in view of the facts established in the Tax Court, this case involves the single issue of whether or not the \$400,000 increase in the net assets of the Van Nuys Building Company constitutes "earnings or profits accumulated" in its hands. The ordinary presumption in favor of the Commissioner thus disappears, and the correct legal consequences of the facts must be determined independently of it. *Lawrence v. Commissioner*, 143 F. (2d) 456, at 459 (C. C. A. 9, 1944).

II.
ARGUMENT.

1. **The Action of the Debtor Corporation With Respect to the Indebtedness Subsequent to the Date the Note Outlawed Is Not Conclusive Against nor Inconsistent With Appellant's Present Position, but Clearly Supports It.**

Respondent argues that the action of the Van Nuys Building Company in paying interest on the \$400,000 obligation between the date when it outlawed in 1920 and December, 1922, is conclusive; since the corporation deducted the payments as interest, it secured a tax advantage as the result; the Appellant is bound by this action and cannot now claim that the payments were anything other than interest.

This issue is not extremely important but the argument is completely specious. The Appellant is a stockholder in the corporation who had nothing to do with its action in deducting the payments to Susanna Van Nuys during this period as interest. Such action did not benefit Appellant. Rather it was disadvantageous to her mother who, by reporting the receipts as interest, paid income tax thereon, whereas, they would have been exempt if treated as dividends. This proceeding involves the tax character of the principal—the \$400,000—and does not involve in any way the character of the payments termed “interest.” If Susanna H. Van Nuys had taken a bad debt or loss deduction with respect to the \$400,000, there would be some inconsistency in the position presently taken by Appellant

that from the corporation's standpoint the increase in assets was gratuitous. However, as pointed out in Appellant's Opening Brief, Susanna H. Van Nuys could not and did not take any such deduction because of the gratuitous character of the transaction. The instant facts fall far short of establishing an estoppel against the Appellant, and are certainly far different from those involved in the corporate entity cases cited on page 8 of Respondent's Brief, where a taxpayer organizes a wholly owned corporation and deals with it as such, and then attempts to regard it or disregard it at his will for tax purposes.

There being thus no basis for estoppel against Appellant, Respondent is faced with its own argument (Resp. Br. pp. 9, 10) that the "book treatment" is of "no moment." This may not be entirely true, but we have covered the point in our opening brief (pp. 36, 37).

Respondent's argument on this point carries only to the date of death of Susanna H. Van Nuys. Effective with death the corporate treatment of the matter was reversed. No further payments of interest were made and the note was written off to capital surplus. Logically, if the payments of interest and expensing of them as such on the corporate books established the indebtedness as being in existence to the date of death, the contrary treatment by the corporation for all times after death must equally establish the contrary, to wit: that the indebtedness was eliminated effective with death. However, the action of the corporation after death was more conclusive than its action prior to death.

The crediting of the amount to paid-in-surplus was not a mere self-serving declaration but had a definite effect on the corporation's tax liability. Certainly, thereafter the corporation could not have resumed making the periodic payments and charging them as interest. Furthermore, for the reasons stated in Appellant's opening brief, there is no question but that such entry was made in good faith and was in perfect harmony with sound accounting practice of that time and of all times since.¹ Of considerable significance, however, is the fact that the action of the corporation immediately after death evinced its clear intention to regard the liability as eliminated. This constituted its "claim of right" to the increase in its net assets. It is clearly settled that when a taxpayer receives funds under a claim of right they constitute income even though they are the subject of litigation, and even though in later years it might be required to repay them. *North American Oil Consolidated v. Burnet*, 286 U. S. 417, 76 L. Ed. 1197, 52 S. Ct. 613 (1932). The "claim of right" on the part of the taxpayer is an essential element of this doctrine, and is of particular importance in a case such as the present one. Here the taxpayer had the money but its note was outstanding. The statute had run and, therefore, it could not be required to pay the note. When it stopped paying interest immediately after

¹"Much weight will be given to the books of account of the taxpayer if they are kept in good faith." Vol. 2, "Law of Federal Income Taxation," Merten's. Section 12.15, p. 154.

death and credited the note to paid-in-surplus, this constituted a claim of right upon its part to the original funds free of the debt—acceptance by the donee under the present facts—thus requiring the elimination of the indebtedness to be given proper tax cognizance at that time. *Boston Consolidated Gas Co. v. Commissioner of Internal Revenue*, 128 F. (2d) 472 (C. C. A. 1, 1942). This case and the claim of right doctrine generally explain and support the rule and the cases cited from pages 25 to 28 of Appellant's Opening Brief. Consequently, the good faith treatment of the item after death as an eliminated liability is of extreme tax significance because under the law it requires the elimination to be given whatever tax cognizance should be given it at that time. It was thus a closed transaction prior to the later litigation and estate tax controversy.

2. A Gratuitous Increase in Net Assets Does Not Constitute Earnings or Profits.

Respondent's argument to the point that a gratuitous increase in net assets might be earnings and profits merits but brief consideration. It is true that certain items such as Government bond interest which are exempt as income in the hands of the corporation nevertheless constitute earnings or profits. This is so because the items are clearly "income", and are "earnings and profits" since they constitute a *return* of money invested in a business transaction. A gratuity, however, is not income at all either in a constitutional or statutory sense.²

McGill, "Taxable Income", 1945, p. 390;

Edwards v. Cuba R. R., 268 U. S. 628, 69 L. Ed. 1124, 45 S. Ct. 614 (1925).

And, it is important to note that in the *Edwards case*, in speaking of certain subsidy payments, which involved considerably more element of consideration than the instant situation, the unanimous court used "profits" and "income" interchangeably, saying at page 623:

"They were not profits or gains from the use or operation of the railroad, and do not constitute income within the meaning of the 16th amendment."

²In the original Revenue Act of 1913 the broad definition of gross income in Section II B corresponding to the present Section 22(a) specifically provided that gifts were not gross income. In the later acts as a matter of statutory arrangement this specific provision was taken out of the section corresponding to Section 22(a) and was placed in a section corresponding to the present Section 22(b) providing that various items including gifts should "not be included in gross income." This is no indication that Congress had changed its view indicated by the 1913 Act to the effect that a gift was not income at all. *U. S. v. Supplee-Biddle Hdwc. Co.*, 265 U. S. 189, 68 L. Ed. 970, 44 S. Ct. 546 (1924).

In answering the general and accounting definitions of “earnings and profits” set forth in Appellant’s Opening Brief, Respondents merely say that accounting concepts are not controlling in determining earnings and profits, citing the *Wheeler case*, 324 U. S. 542. It is important to note, however, that in that case the very reason why accounting concepts were not accepted was due to the Court’s desire to reach agreement in the rules applicable in determining taxable income and in those applicable in determining earnings and profits. As a matter of fact, that opinion clearly indicates that but for such compelling policy of tax law consistency, accounting concepts should control. Since the increase in assets in the present case would not be income, the principle of the *Wheeler case* would require that they not be included as earnings and profits. As previously stated, accounting concepts and income tax concepts go hand in hand on this issue.

The two short excerpts from Mr. Rudick’s article on earnings and profits in 89 *Penn. Law Rev.*, 865 (1941), referred to in Respondent’s Brief at pages 14 and 18 are misleading. The first citation indicates Mr. Rudick feels that the proceeds of a cancellation of indebtedness should be included in earnings and profits. Actually, if his entire sentence had been quoted, it would be clear that he was merely referring to those types of cancellations which would constitute taxable income. There is no intimation that an elimination of indebtedness which is not taxable and which is of the character of the elimination presently involved would constitute earnings and profits. Mr.

Rudick's own language on the question of whether a gift constitutes earnings and profits is unmistakably clear (p. 882):

“(c) Gifts, bequests and devises: In *Cummings v. Commissioner*, it is suggested by way of *dictum* that a gift to a corporation would constitute earnings or profits. Presumably, the same suggestion would have been made as to a bequest or devise. From the standpoint of sheer logic, it is difficult to support this conclusion. Although a gift, bequest or devise may increase surplus, it is not, according to common parlance, ‘earned’ nor is it a profit. Moreover, unlike life insurance proceeds, such an accretion is not a substitute for lost profits. While apart from legal considerations, a fairly good argument might be made for treating distributions from *any* source, other than paid-in capital, as ‘dividends’, it does not appear that Congress intended to go so far, since it limited ‘dividends’ to distributions out of post-1913 *earnings or profits*. Admittedly, Congress has power to tax a distribution out of a gift, bequest or devise to the corporation, but, as pointed out by Mr. Paul, we must not confuse ‘what Congress may constitutionally do and what it has tried to do.’”

We come then to the *Cummings case*, 73 F. (2d) 477 (C. C. A. 1, 1935) and others involving the question of whether or not the proceeds of life insurance received by a corporate beneficiary tax free for income tax purposes should be included in its earnings and profits.

In all of the cases thus far reported involving this point there have been sufficient earnings and profits aside from

the insurance proceeds to cover the distribution in question and, therefore, the discussion pertinent for our purpose has been purely by way of *dictum*. The Tax Court's view is indicated by the case of *Isaac May*, 20 B. T. A. 282 (1930). It clearly indicated that if the proceeds received were not income at all (as is clearly so in the case of a gift), then they could not constitute earnings and profits. However, the Court indicated its preference for the view that the proceeds should be included as earnings since insurance premiums would have been deducted from earnings and profits, and it would only be fair that the insurance proceeds should be credited to the same account.

It is submitted that this view is completely sound and serves to distinguish the insurance proceeds case from the gift case where the corporation has furnished no consideration whatsoever for the gift it ultimately receives. The *Cummings case*, previously cited, involving this same issue, stressed the same point with respect to the premiums having been charged to earnings, and in that respect its *dictum* is sound. However, its broader view—its secondary *dictum* so to speak—that a gift would constitute earnings and profits is, it is submitted, completely contrary to the intention of Congress and the law on the subject.

In this respect, it is similar to the *Kirby Lumber case*, the prime authority of both the Tax Court and Respondent, 284 U. S. 1, 76 L. Ed. 131, 52 S. Ct. 4 (1931). In that case during the year 1922 the corporation had purchased in the open market for a purchase price aggregating \$940,778.70 its own bonds of an aggregate par value

of \$1,078,300. It retired the bonds so purchased and the Commissioner claimed that the difference between issue price and purchase price—\$137,521—constituted taxable income. The Supreme Court agreed, Mr. Justice Holmes saying that “As a result of its *dealings* it made available \$137,521.30 assets previously offset by the obligation of bonds now extinct.” Thus, the facts in the *Kirby case* involved the normal financial “operations” of a corporation. It is common practice for corporations with securities outstanding to watch the market value thereof and from time to time purchase the same when they have the funds available and when the price is right. Hoagland, “Corporate Finance” (1947), p. 95. Through this financial phase of a corporation’s operations it makes money. Usually a corporation makes money by buying property and selling it at a higher figure, but the short sales transactions in the securities and commodities markets are clear examples of operating profits in the reverse situation where the property is sold and later bought at a lesser figure. This is the *Kirby Lumber* situation and the profit resulting is an operating profit from financial operations similar to the operating profit from trading or the ordinary commercial activity of buying first and selling later.

The character of this sort of transaction as an ordinary “financial operation” ceases when the corporate debtor negotiates with the creditor and the debt is settled for less than face value. There is then a personal relationship between the debtor and creditor in which the debt is treated as a promise rather than a piece of property. Such a

personal cancellation of the indebtedness is gratuitous and under the *American Dental case* does not constitute taxable income. In the instant case the relationships between the corporate debtor and the creditor were of the closest family type and in our original brief we have pointed out the several reasons why the instant case is of a more definite gratuitous character than the *American Dental case*. In addition to those considerations it should be noted that in the *Kirby Lumber case* a profit of roughly 10% was made upon the purchase of the bonds. That is, the corporate debtor paid roughly 90¢ on the dollar. In the instant case, the corporate debtor paid nothing. The entire principal was eliminated.

The differences between the instant case and the *Kirby Lumber Company case* are thus fundamental, and can not be ignored as a matter of law. Surely it can not be said that a profit to a corporation from its financial operations on the open market is the same as a gratuitous elimination of the entire principal amount of indebtedness within a family corporation.

3. The Instant Question Is One of Law, Not of Fact, and Should Be Reviewed on the Merits by This Court.

In Appellant's Opening Brief three cases were cited directly in point on the above question. The principal one of these was the *American Dental decision*, involving a cancellation of indebtedness where the Tax Court was reversed with the statement that it was not "free to determine at will or upon evidence and without judicial review the tests to be applied to facts to determine whether the result is or is not a gift." Justices Jackson and Frankfurter dissented on that point. A few months later, with the personnel of the Court unchanged, Justice Jackson wrote the opinion in the *Dobson case*, and it is he and Justice Frankfurter who have been responsible for the broad dicta contained in subsequent cases as to the restrictive power of review over Tax Court decisions.

It is of extreme significance that while Justice Jackson freely criticized numerous preceding cases in the *Dobson* opinion, he made no reference to the *American Dental case*, nor has it been criticized, nor in any way mentioned in the decisions following the *Dobson case*. In Mr. Randolph Paul's careful and complete analysis of the *Dobson case*, he concludes that the principle of the *American Dental decision* is consistent with it and that the Supreme Court has done nothing to indicate that the *American Dental* rule has been changed. "*Dobson v. Commissioner; Strange Ways of Law and Fact*," 57 Harvard Law Review 753, at 838-839 (1944).

Nor need we remind this Court that Congress intended Circuit Courts to review issues such as are involved in the present case and as were involved in the *American*

Dental case. The procedural problem presently involved is controlled by Section 1141(c) of the Internal Revenue Code, which was introduced into the Statute in 1926. The Committee reports accompanying it there gave several examples of the "questions of law" which the Circuit Courts should review including "the proper interpretation and application of the statute or any regulation having the force of law." H. R. Report No. 1, 69th Congress, 1st Session (1926), 19; Senate Report No. 52, 69th Congress, 1st Session (1926) 36-37. There can be no doubt that Congress intended that the Circuit Courts should review a case such as the present, turning as it does upon the interpretation of the statutory phrase "earnings or profits." Such a conclusion would not have been questioned between 1926 and 1943, the date of the *Dobson decision*. And some eighteen months after the *Dobson decision* the Chief Justice felt it necessary to reiterate the Congressional intent and point out that "Since our decision in the *Dobson case* we have frequently re-examined, as matters of law, determinations by the Tax Court of the meaning of the words of a statute as applied to facts found by that Court." *Bingham's Trust v. Commissioner*, 325 U. S. 365, at 371, 89 L. ed. 1671, 65 S. Ct. 1232. Consequently, the intention of Congress is perfectly in accord with the controlling cases directly in point.

Respondents have made no attempt to answer or distinguish the *American Dental case* or other cases directly in point cited in Appellant's Opening Brief, nor to explain why the intention of Congress should be disregarded, but have countered with general statements made in cases far different on the facts from the instant one. Nothing more

need be said. It is useless to examine dicta when the controlling statute and cases directly in point unanimously and conclusively decide the actual issue. Furthermore, the broad, general dicta cited by Appellant have been violated by the Appellate Courts on numerous occasions since the *Dobson* case. Even Justice Frankfurter is guilty of this. Note his consideration on the merits of the unique combination of facts involving a claimed waiver in *Angelus Milling Co. v. Commissioner*, 325 U. S. 293, 89 L. ed. 1619, 65 S. Ct. 1162 (1945).

In the *Seattle Brewing Co.* and *Rainier Brewing Co.* cases, 165 F. (2d) 216-217 (C. C. A. 9, 1948), ruled upon by Respondent, the Tax Court had not merely interpreted a written contract, but, as this Court specifically pointed out on re-hearing, there were considerable testimony and other facts adduced at the hearing which the Tax Court weighed in reaching its decision. Furthermore, those cases involved a very unusual and complicated business arrangement involving trade names which partook of many of the elements of a sale and many of the elements of a license. If this Court had treated the issue as one of law, the precedent would have been of little value because no clear-cut legal principle had emerged, and in the next comparable situation in which one factor might be added or subtracted an appeal to the Circuit Court would be necessary to determine whether that was the factor which might prompt an opposite decision. In neither the *Brewing cases* nor the *John Kelly case*, 325 U. S. 287 (1945) could any legal issue be stated without including in the statement all of the numerous criteria involved in that particular case.

This is not so in the instant case. Several clear-cut legal issues emerge with respect to which a precedent is needed and would be of considerable aid in subsequent cases involving the constant problem of elimination of corporate indebtedness. The first general legal issue is whether or not a gratuitous increase in the net assets of a corporation constitutes earnings or profits. The next general legal issue is whether or not a gratuitous increase can result from passivity as well as activity. The final general legal issue is whether or not a gratuity is altered for tax purposes by the fact that subsequent litigation confirms it. All three of these are vital, general legal principles. Numerous cases convincingly support Appellant's position on each of them.

It is of utmost significance that the Tax Court, in holding for the Respondent, has not made a single finding of fact contrary to any arguments advanced by Appellant or this Court. It has not—because it could not under the evidence—find that Susanna Van Nuys had no donative intent toward her corporation. Rather its entire theory is that the delivery element of a gift was lacking since no gift could be accomplished by passivity and the running of the statute; so the benefit must have been created by the successful litigation. Thus its conclusion is beyond the realm of the facts and is based on two general legal principles, both of which are clearly erroneous.

Respectfully submitted,

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United States
Circuit Court of Appeals
For the Ninth Circuit.

MOORE DRY DOCK COMPANY and FIREMAN'S FUND
INDEMNITY COMPANY, a corporation,

Appellants,

vs.

WARREN H. PILLSBURY, Deputy Commissioner for the
Thirteenth Compensation District of the Bureau of Em-
ployees' Compensation, Federal Security Agency, and
LUELLA G. CAMPBELL, also known as LUELLA G.
KELLY, alleged widow of WILLIAM ANGUS CAMP-
BELL, deceased,

Appellees.

Apostles on Appeal

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

FILED

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United States
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the District Court of the United States,
Northern District of California, Southern
Division

No. 26718-H

MOORE DRY DOCK COMPANY, and FIRE-
MAN'S FUND INDEMNITY COMPANY, a
Corporation,

Complainants,

vs.

WARREN H. PILLSBURY, Deputy Commis-
sioner for the Thirteenth Compensation Dis-
trict of the Bureau of Employees Compensation,
Federal Security Agency, and LUELLA G.
CAMPBELL, also known as LUELLA G.
KELLY, alleged widow of WILLIAM ANGUS
CAMPBELL, Deceased,

Respondents.

COMPLAINT FOR INJUNCTION

Complainants complain of Respondents above
named and allege as follows:

I.

That complainant Moore Dry Dock Company is,
and was at all times mentioned herein, a corpora-
tion duly organized and existing under and by vir-
tue of the laws of the State of California, duly
organized to operate and do business in the State
of California under and by virtue of the laws of
the State of California.

II.

That the complainant Fireman's Fund Indemnity Company is, and was at all times herein mentioned, a corporation, duly organized and existing under and by virtue of the laws of the [1*] State of California, and duly organized to operate and do business in the State of California under and by virtue of the laws of the State of California.

III.

That the respondent Warren H. Pillsbury is, and at all times herein mentioned, has been Deputy Commissioner for the Thirteenth Compensation District of the Bureau of Employees Compensation, Federal Security Agency, formerly known as the United States Employees' Compensation Commission, and that said Thirteenth Compensation District includes the State of California; that as said Deputy Commissioner, the said Warren H. Pillsbury administers the provisions of that certain Act of Congress known as the "Longshoremen's and Harbor Workers' Compensation Act" (Public Act No. 803, 69th Congress).

IV.

That the respondent Luella G. Campbell, also known as Luella G. Kelly, is the person in whose favor an Award of Death Benefit was made, as hereinafter related, and she is, therefore, beneficially interested in this proceeding, and for that reason is made a party respondent.

*Page numbering appearing at foot of page of original certified Transcript of Record.

V.

That on the 12th day of May, 1945, William Angus Campbell was in the employ of the Moore Dry Dock Company at Oakland, California, as a stage rigger and was engaged in ship repair operations on a completed vessel on navigable waters of the United States; that said William Angus Campbell then and there sustained injury arising out of and in the course of his employment, resulting in immediate death, when he fell from the vessel to the water and was drowned.

VI.

That on the 12th day of May, 1945, the Fireman's Fund Indemnity Company, under and by virtue of a contract with the [2] Moore Dry Dock Company, insured said employer against the liability imposed against it by the Longshoremen's and Harbor Workers' Compensation Act.

VII.

That said Luella G. Campbell, also known as Luella G. Kelly, filed her claim with the respondent Warren H. Pillsbury, as Deputy Commissioner, against the complainants above named, for the purpose of recovering benefits under the Longshoremen's and Harbor Workers' Compensation Act by reason of the death of William Angus Campbell; that thereafter the matter came on regularly for hearing before said Deputy Commissioner, the issues were joined, and evidence, both oral and documentary, was received and the matter submitted for decision.

VIII.

That thereafter, on the 3rd day of December, 1946, the respondent Warren H. Pillsbury, as Deputy Commissioner, filed in his office and served upon the parties to said proceedings a Compensation Order—Award of Death Benefit; that a copy of said Compensation Order—Award of Death Benefit is attached hereto as Exhibit “A” and made a part hereof.

IX.

That no proceedings for the suspension or setting aside of said Compensation Order—Award of Death Benefit filed December 3, 1946, have ever been instituted as provided in subdivision (b) of Section 921 of said Act, or elsewhere or at all. That under the provisions of said Act the said Order became effective when filed on December 3, 1946, and except for these proceedings to suspend or set aside said Order would become final at the expiration of thirty days after said December 3, 1946.

X.

That said Compensation Order—Award of Death Benefit is not in accord with law in finding the respondent Luella G. Campbell, [3] also known as Luella G. Kelly, to be a legal dependent upon the deceased employee on May 12, 1945, and entitled to a death benefit at the rate of \$13.13 a week commencing with May 13, 1945, and continuing thereafter until the further order of the Deputy Commissioner, when the evidence shows without contradiction,

(a) That said Luella G. Campbell had not been supported by the deceased William Angus Campbell

for over twenty years before his fatal injury on May 12, 1945.

(b) That said Luella G. Campbell did on May 14, 1938, marry one William J. M. Kelly at Brechin, near Nanaimo, in British Columbia, and these two have since that time lived as man and wife, her support for that period being supplied by said Kelly.

XI.

Complainants are informed and believe and on such information and belief allege that respondent Luella G. Campbell, also known as Luella G. Kelly, will be unable to pay to compainants herein the amounts which compainants are required to pay by reason of said Compensation Order—Award of Death Benefit, and that unless the enforcement of said Order be stayed by injunction herein complainants will suffer irreparable damage and injury.

XII.

That the complainants have no adequate nor any remedy other than these proceedings which are brought pursuant to the provisions of Section 921 of the Longshoremen's and Harbor Workers' Compensation Act which provides that if not in accordance with law a compensation order may be suspended or set aside in whole or in part through injunction proceedings brought by any party in interest against the Deputy Commissioner making the order.

XIII.

That all of said proceedings before the said Deputy Commissioner are contained in a file of said

Deputy Commissioner under Claim Number 2539, Case Number 8-1620, together with the testimony of witnesses heard by the Deputy Commissioner or by deposition.

That the Deputy Commissioner should be required to file with the clerk of this court, at a time to be fixed by the court, a certified copy of all proceedings had before him, together with all exhibits, transcripts of testimony, letters and documents of every nature and description received by said Deputy Commissioner in consideration of said claim.

Wherefore, complainants pray that process in due form of law according to the course of this Honorable Court may issue and that respondents may be cited to appear and answer all and singular the matters hereinbefore set forth and that the order of said Deputy Commissioner filed December 3, 1946, be set aside and declared a nullity and that a mandatory injunction be issued herein setting aside and restraining enforcement of said purported Order dated December 3, 1946, and that the respondents be permanently enjoined from making or attempting to make any further orders with respect to said proceeding; that pending the hearing of the cause or in less than three days notice to the parties interested and the Deputy Commissioner, this Honorable Court issue an interlocutory injunction allowing the stay of such payments pending the determination of this cause; and for such other further and different relief as to the Court may seem justified, and for costs incurred herein.

LEONARD, HANNA &

BROPHY,

Attorneys for Complainants.

(Here follows Exhibit "A"—Compensation Order—Award of Death Benefit, Case No. 8-1620, Claim No. 2539, filed in the office of Warren H. Pillsbury, as Deputy Commissioner, on December 3, 1946, a copy of which Order is in the Volume of Transcript of Testimony at Hearing, March 18, 1946.) [4-A]

State of California,
City and County of San Francisco—ss.

L. M. Caldwell, being first duly sworn, on behalf of the above-named complainants, deposes and says: That he is assistant vice president of the complainant Fireman's Fund Indemnity Company; that he has read the foregoing Complaint for Injunction and known the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on information and belief, and as to those matters that he believes it to be true.

L. M. CALDWELL,
Assistant Vice President,
Fireman's Fund Indemnity
Company.

Subscribed and sworn to before me this 30th day of December, 1946.

KATHRYN E. STONE,
Notary Public in and for said City and County of
San Francisco, State of California.

My commission expires March 15, 1949.

[Endorsed]: Filed Dec. 31, 1946. [5]

[Title of District Court and Cause.]

ORDER

Complainants' petition for an interlocutory injunction having been briefed, argued and submitted for decision, and having been fully considered,

It Is Ordered that the interlocutory injunction be, and the same is hereby granted pending final disposition of the claim of Luella G. Kelly.

Jones v. Shepard, 20 F. Supp. 345;

Walliser v. Bassett, 33 F. Supp. 636;

Atlantic Stevedoring Co. v. Lowe, 18 F.
Supp. 602.

Dated March 11, 1947.

GEORGE B. HARRIS,

United States District Judge.

[Endorsed]: Filed March 11, 1947. [6]

[Title of District Court and Cause.]

MOTION OF DEFENDANT WARREN H.
PILLSBURY, DEPUTY COMMISSIONER,
TO DISMISS BILL OF COMPLAINT

Now comes the defendant Warren H. Pillsbury, Deputy Commissioner of the Bureau of Employees Compensation, Federal Security Agency for the Thirteenth Compensation District, by his attorney, Frank J. Hennessy, United States Attorney for the Northern District of California, and moves this Honorable Court to dismiss the Bill of Complaint after review of the Compensation Order filed herein for the following reasons:

1. That the Bill of Complaint filed herein does not state a cause of action and does not entitle plaintiffs to any relief, nor does said Bill of Complaint state a [7] claim against the defendant Warren H. Pillsbury, Deputy Commissioner, upon which relief can be granted.

2. That it appears from the Bill of Complaint, including the Transcripts of Testimony taken before the Deputy Commissioner on file herein, that the findings of fact that the Deputy Commissioner, in the compensation order filed by him on December 3, 1946, complained of in the Bill of Complaint, was supported by evidence and under the law said findings of fact should be regarded as final and conclusive.

3. That it appears from the Bill of Complaint, including said Transcripts of Testimony, that said

compensation order complained of herein is in all respects in accordance with law.

4. For such other good and sufficient reasons as may be shown.

/s/ FRANK J. HENNESSY,
United States Attorney,
By W. E. LICKING,
Assistant U. S. Atty.,
/s/ JAMES T. DAVIS,
Assistant United States
Attorney,

Attorneys for Respondent Warren H. Pillsbury,
Deputy Commissioner for the Thirteenth Compensation District of the Bureau of Employees Compensation, Federal Security Agency.

[Endorsed]: Filed March 18, 1947. [8]

[Title of District Court and Cause.]

ORDER

Respondent's motion to dismiss having been argued, briefed and presented to the court for decision, and the same having been duly considered,

It Is Ordered that the motion be and the same hereby is Denied and that the award of the Compensation Commissioner dated December 3, 1946, be and the same hereby is confirmed.

Dated June 25, 1947.

GEORGE B. HARRIS,
United States District Judge.

[Endorsed]: Filed June 25, 1947. [9]

[Title of District Court and Cause.]

NOTICE OF MOTION RE INTERLOCUTORY
INJUNCTION

To the Respondent, Warren H. Pillsbury, Deputy
Commissioner of the Federal Security Agency,
Bureau of Employees' Compensation, and to
United States Attorney, Attorney for said re-
spondent:

To Luella G. Campbell, also known as Luella G.
Kelly, and to Victor B. Harrison, her Attorney:

You and each of you will please take notice that
the Complainants above named, through their at-
torney, will move the above entitled Court, in the
Court Room of Judge George B. Harris, located in
the Post Office Building, San Francisco, California,
on October 6, 1947, at the hour of 10:00 a.m., or as
soon thereafter [10] as the matter may be heard
for its Order for an interlocutory injunction staying
the execution of the compensation award issued
herein pending the appeal of this matter to the
United States Circuit Court of Appeals for the
Ninth District.

Said motion will be made upon the ground that
Complainants herein will be irreparably damaged
if an injunction is not allowed during this appeal,
and the granting of said injunction will obviate
much trouble, vexation and multiplicity of suits.

Said motion will be based upon the Affidavit of

C. R. Umland filed herewith and upon the records, files and proceedings herein.

/s/ WARREN L. HANNA,

Proctor for Libelants.

Dated this 24th day of September, 1947. [11]

State of California,

City and County of San Francisco—ss.

Gretchen Becker, being duly sworn, says that affiant is a citizen of the United States, over 18 years of age, a resident of the City and County of San Francisco and not a party to the within action. That affiant's business address is 465 California Street, San Francisco. That affiant served copies of the attached Notice of Motion Re Interlocutory Injunction by placing said copies into separate envelopes respectively addressed as follows:

Warren H. Pillsbury, 630 Sansome Street,
San Francisco, California;

Frank J. Hennessy, United States Attorney,
422 Post Office Building, San Francisco 1,
California;

Luella G. Kelly, 235 St. George Street, Na-
naimo, British Columbia, Canada;

Victor B. Harrison, 141 Bastion Street, Na-
naimo, British Columbia, Canada.

That said envelopes were then sealed and postage fully prepaid thereon, and that said envelopes were each of them on September 24th, 1947, deposited in the United States mail at San Francisco. That

there is delivery service by United States and/or Canadian mail to the places so addressed, or regular communication by such mail or mails between the place of mailing and the places so addressed.

/s/ GRETCHEN BECKER.

Subscribed and sworn to before me this 24th day of September, 1947.

[Seal] KATHRYN E. STONE,
Notary Public.

[Endorsed]: Filed Sept. 24, 1947. [12]

[Title of District Court and Cause.]

AFFIDAVIT FOR INJUNCTION PENDING
APPEAL

State of California,
City and County of San Francisco—ss.

C. R. Umland, being first duly sworn, deposes and says:

That he is Assistant Superintendent of Claims for the Fireman's Fund Indemnity Company, a corporation, one of the libelants in the above-entitled cause; that libelants will be irreparably damaged if an injunction is not allowed during this appeal in that if the award made in favor of respondent Luella G. Campbell, also known as Luella G. Kelly, is paid and then the determination on appeal is made in favor of libelants, much [13] trouble and vexation and multiplicity of suits will be involved in order to obtain the return of such moneys,

amounting at this time to more than \$1,500, particularly in view of the fact that said Luella G. Kelly is neither a citizen nor a resident of the United States, but resides in British Columbia, by reason of which the courts of the United States are not open to your complainants to enforce repayment of moneys which libelants are obligated to pay under the award if stay is not granted, and the advantage of this appeal will thereby be wholly lost to your libelants above named.

C. R. UMLAND,

Assistant Superintendent of Claims, Fireman's
Fund Indemnity Company.

Subscribed and sworn to before me this 24th day
of September, 1947.

[Seal] LINA M. REINECKE,

Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires November 19, 1950. [14]

State of California,

City and County of San Francisco—ss.

Gretchen Becker, being duly sworn, says that
affiant is a citizen of the United States, over 18
years of age, a resident of the City and County of
San Francisco and not a party to the within action.
That affiant's business address is 465 California
Street, San Francisco. That affiant served copies of
the attached Affidavit for Injunction Pending Ap-

peal by placing said copies into separate envelopes respectively addressed as follows:

Warren H. Pillsbury, 630 Sansome Street,
San Francisco, California;

Frank J. Hennessy, United States Attorney,
422 Post Office Building, San Francisco 1,
California;

Luella J. Kelly, 235 St. George Street, Na-
naimo, British Columbia, Canada;

Victor B. Harrison, 141 Bastion Street, Na-
naimo, British Columbia, Canada.

That said envelopes were then sealed and postage fully prepaid thereon, and that said envelopes were each of them on September 24th, 1947, deposited in the United States mail at San Francisco. That there is delivery service by United States and/or Canadian mail to the places so addressed, or regular communication by such mail or mails between the place of mailing and the places so addressed.

/s/ GRETCHEN BECKER.

Subscribed and sworn to before me this 24th day of September, 1947.

[Seal] KATHRYN E. STONE,
Notary Public.

[Endorsed]: Filed Sept. 24, 1947. [15]

[Title of District Court and Cause.]

CITATION AND ADMISSION OF SERVICE

The United States of America to the respondents Warren H. Pillsbury, Deputy Commissioner of the Thirteenth Compensation District, under the Longshoremen's and Harbor Workers' Compensation Act, and Luella G. Campbell, also known as Luella G. Kelly:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals, Ninth Circuit, to be held at the Post Office Building in the City and County of San Francisco, State of California, within forty (40) days from the date hereof, pursuant to a petition for appeal filed in the Clerk's Office of the District Court of the United States, for the [16] Northern District of California, Southern Division; wherein the Moore Dry Dock Company, a corporation, and the Fireman's Fund Indemnity Company, a corporation, are the appellants, and Warren H. Pillsbury, Deputy Commissioner for the Thirteenth Compensation District under the Longshoremen's and Harbor Workers' Compensation Act, and Luella G. Campbell, also known as Luella G. Kelly, are the respondent-appellees, to show cause, if any there be, why the decree and denial of complaint for injunction mentioned in said petition for appeal should not be corrected and speedy justice should not be done in that behalf.

Given under my hand in the City and County of San Francisco, in the District and Circuit aforesaid, this 24th day of September, 1947, and in the independence of America the One Hundred and Seventy-first year.

GEORGE B. HARRIS,
United States District Judge for the Northern
District, Southern Division.

Receipt of copy of the above Citation and Admission of Service is hereby acknowledged on this 24th day of September, 1947.

FRANK J. HENNESSY,
U. S. Attorney, and Attorney for Respondent
Warren H. Pillsbury.

By C. ELMER COLETT.

[Endorsed]: Filed Sept. 24, 1947. [17]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

Come now the complainants in the above-entitled cause, by their proctor, and in connection with their petition for appeal, assign the following errors in the decree of this court entered:

I.

That the United States District Court for the Northern District of California, Southern Division, erred in making and entering the order and decree, dated the 25th day of June, 1947, denying the com-

plainants' application for mandatory injunction to restrain the order of the respondent, Warren H. Pillsbury, as set forth in Complaint for Injunction filed on December 30, 1946. [18]

II.

That the said court erred in ordering a denial of the motion to dismiss and in confirming the award of compensation made by the respondent Warren H. Pillsbury, made and filed on December 3, 1946.

III.

That said court erred in refusing to enter a decree and order herein declaring that the said compensation order of respondent Warren H. Pillsbury, described in the complainants' complaint, was not in accordance with law, and that the same be vacated and set aside.

IV.

That said court erred in supporting the finding of respondent Warren H. Pillsbury, Deputy Commissioner for the Thirteenth Compensation District, under the Longshoremen's and Harbor Workers' Compensation Act, that respondent Luella G. Campbell, also known as Luella G. Kelly, was a legal dependant of the deceased employee, William Angus Campbell, on May 12, 1945; and that said Luella G. Kelly was thereby entitled to a death benefit at the rate of \$13.13 a week commencing with May 13, 1945, and continuing thereafter until the further order of the Deputy Commissioner; that

there is no justification in law or fact for such finding of dependency when the evidence showed without contradiction that said Luella G. Kelly had not been supported by the deceased William Angus Campbell for over twenty years before his fatal injury on May 12, 1945, and showed further that said Luella G. Kelly did in May, 1938, seven years prior to the death of said William Angus Campbell, marry one William J. M. Kelly, and did thereafter continuously until the death of said William Angus Campbell and, in fact, until this day live with him as his wife and receive her complete and sole support from said William J. M. Kelly; and that therefore your [19] Honorable Court exceeded its jurisdiction and committed an act without its jurisdiction in refusing the issuance of a permanent injunction, as requested, and in confirming the award of the respondent Warren H. Pillsbury.

V.

That said court erred in confirming the application of section 2(16) of the Longshoremen's and Harbor Workers' Compensation Act (U. S. Code Title 33, section 902(16)) to the facts of this case in such manner as to find respondent Luella G. Campbell, also known as Luella G. Kelly, to have been a legal dependent upon the deceased employee, within the meaning of the above-mentioned Compensation Act, as determined by respondent Warren H. Pillsbury, and in confirming the granting of benefits to said Luella G. Kelly when the provisions of section 9b of the Longshoremen's and Har-

bor Workers' Compensation Act (U. S. Code Title 33, section 909b) preclude the payment of benefits to a surviving wife except during widowhood, whereas said Luella G. Kelly has at all times since the death of the deceased employee (and for seven years prior thereto) been married to and living with William J. M. Kelly as his wife, and does not come within the provisions of said section.

/s/ WARREN L. HANNA,
Proctor for Complainants.

Receipt of copy of the above Assignment of Errors is acknowledged this 24th day of September, 1947.

/s/ FRANK J. HENNESSY,
United States Attorney,
Attorney for Respondent
William H. Pillsbury.
By C. ELMER COLETT.

[Endorsed]: Filed Sept. 24, 1947. [20]

[Title of District Court and Cause.]

ORDER ALLOWING APPEAL

The petition of the complainants in the above-entitled cause for the allowance of an appeal to the United States Circuit Court of Appeals for the Ninth Circuit is hereby allowed, the appellants to file a bond in the sum of Two Hundred and Fifty

Dollars to be approved by the undersigned Judge and conditioned as a bond for costs of the said Circuit Court of Appeals.

It is further ordered that a copy of this order, certified by the clerk to be such, may be served upon the solicitors for said Warren H. Pillsbury in lieu of personal service upon him. [21]

Done in Chambers this 24th day of September, 1947.

GEORGE B. HARRIS,
United States District Judge for the Northern
District, Southern Division.

Receipt of copy of the above Order Allowing Appeal is hereby admitted this 24th day of September, 1947.

FRANK J. HENNESSY,
U. S. Attorney,
Attorney for Respondent
Warren H. Pillsbury.
By C. ELMER COLETT.

[Endorsed]: Filed Sept. 24, 1947. [22]

[Title of District Court and Cause.]

PETITION FOR ALLOWANCE OF APPEAL
AND FOR INJUNCTION PENDING AP-
PEAL

The libelants, Moore Dry Dock Company, a corporation, and Fireman's Fund Indemnity Company, a corporation, each believing itself aggrieved by the

decree of the court made and entered on the 25th day of June, 1947, wherein and whereby its libel and bill of complaint for injunction was denied, does hereby appeal from said decree to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons specified in the assignment of errors, which is filed herewith, and your petitioners respectfully pray that this appeal may be allowed, that a citation be issued directed to the above-named respondents and each of them, as provided by law, and that a transcript of record [23] and proceedings upon which said decree was based and duly authenticated and sent to the Circuit Court of Appeals for the Ninth Circuit.

MOORE DRY DOCK
COMPANY and
FIREMAN'S FUND
INDEMNITY COMPANY.

By /s/ WARREN L. HANNA,
Their Proctor.

Receipt of copy of the above petition for allowance of appeal and for injunction pending appeal is hereby admitted this 24th day of September, 1947.

FRANK J. HENNESSY,
Attorney for Respondent
Warren H. Pillsbury,

By C. ELMER COLETT.

[Endorsed]: Filed Oct. 3, 1947. [24]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor, it is Ordered that the Appellants herein may have to and including December 13, 1947, to file the Record on Appeal in the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated October 31, 1947.

GEORGE B. HARRIS,
United States District Judge.

[Endorsed]: Filed Oct. 31, 1947. [25]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor, It Is Hereby Ordered that the Appellants herein may have to and including December 23, 1947, to file the Record on Appeal in the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated December 11, 1947.

GEORGE B. HARRIS,
United States District Court.

[Endorsed]: Filed Dec. 11, 1947. [26]

Federal Security Agency, Bureau of Employees
Compensation, 13th Compensation District

Case No. 8-1620. Claim No. 2539

In the Matter of the claim for compensation under
the Longshoremen's and Harbor Workers'
Compensation Act

LUELLA G. CAMPBELL, also known as
LUELLA G. KELLY, Widow of WILLIAM
ANGUS CAMPBELL, Deceased,
Claimant,

Against

MOORE DRY DOCK COMPANY,
Employer,
FIREMAN'S FUND INDEMNITY COMPANY,
Insurance Carrier.

COMPENSATION ORDER—AWARD OF DEATH BENEFIT

Such investigation in respect to the above entitled
claim having been made as is considered necessary,
and a hearing having been duly held in conformity
with law, the Deputy Commissioner makes the
following:

Findings of Fact

That on the 12th day of May, 1945, William
Campbell, husband of the claimant herein, was in
the employ of the employer above named at Oak-

land, in the State of California, in the 13th Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under said Act was insured by Fireman's Fund Indemnity Company;

That on said day the said employee while performing service for the employer as a stage rigger and engaged in ship repair operations on a completed vessel on navigable waters of the United States at said harbor, sustained personal injury occurring in the course of and arising out of his employment, and resulting in immediate death as follows: He fell from the vessel into the water and was drowned:

That the average annual earnings of the employee herein at the time of his injury are not determined, and a determination thereof is deferred until later necessity arises, that the average weekly wage is admitted to exceed \$37.50;

That the claimant herein, Luella G. Campbell also known as Luella G. Kelly, was born December 26th, 1903, and was married to the employee, William Angus Campbell, on February 8th, 1922. The said employee left claimant on or about September 4th, 1923. During the following period of five months he wrote her on several occasions and thereafter did not communicate with her to the time of his death. He did not after his departure contribute to

her support or to the support of their two children; that such conduct constituted desertion of claimant by the said William Angus Campbell. In good faith and believing her husband, William Angus Campbell, to be dead, claimant married one William James Kelly on May 14th, 1938. At said time the said William Angus Campbell was still living. No divorce was ever had between claimant and William Angus Campbell, that therefore claimant was still the wife of William Angus Campbell at the time of his death on May 12th, 1945, and that the said William Angus Campbell was still deserting her at said time. That claimant is entitled to a death benefit at the rate of \$13.13 a week commencing with May 13th, 1945, and payable at said rate in installments each two weeks or monthly at her election until the further order of the Deputy Commissioner. That the children of the said William Angus Campbell had reached the age of 18 years prior to the time of his death.

The claimant's attorney, Mr. Victory B. Harrison, has rendered service to claimant in the prosecution of her claim of the reasonable value of \$150.00 and is entitled to a lien therefor upon compensation herein awarded.

Upon the foregoing facts, the Deputy Commissioner makes the following

Award

That the employer, Moore Dry Dock Company, and its insurance carrier, Fireman's Fund Indem-

nity Company, shall pay to the claimant compensation as follows:

To claimant, Luella G. Campbell, also known as Luella G. Kelly, the sum of \$13.13 a week payable in installments each two weeks or monthly at her election beginning with May 13, 1945, until the further order of the Deputy Commissioner, less, however, the sum of \$150.00 to be deducted from said payments and paid by defendants to said Victor B. Harrison upon his lien for attorney's fees.

Given under my hand at San Francisco, California, this 3rd day of December, 1946.

WARREN H. PILLSBURY,
Deputy Commissioner,
13th Compensation District.

WHP:s:mmc:

(From the Transcript of Testimony filed March 31, 1947.) [28]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 28 pages, numbered from 1 to 28, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of Moore Dry Dock Company and Fireman's Fund Indemnity Company, a corporation, Complainants, vs. Warren H. Pillsbury, Deputy Commissioner of the Thirteenth Compensation District of the Bureau of Employees Compensation, etc., et al., Respondents, No. 26718H, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$5.30 and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 23rd day of December, A.D. 1947.

[Seal]

C. W. CALBREATH,
Clerk,

/s/ M. E. VAN BUREN,
Deputy Clerk. [29]

[Endorsed]: No. 11819. United States Circuit Court of Appeals for the Ninth Circuit. Moore Dry Dock Company and Fireman's Fund Indemnity Company, a corporation, Appellants, vs. Warren H. Pillsbury, Deputy Commissioner for the Thirteenth Compensation District of the Bureau of Employees' Compensation, Federal Security Agency, and Luella G. Campbell, also known as Luella G. Kelly, alleged widow of William Angus Campbell, deceased, Appellees. Apostles on Appeal. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed December 23, 1947.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

No. 11819

United States Circuit Court of Appeals
For the Ninth Circuit

MOORE DRY DOCK COMPANY and FIREMAN'S
FUND INDEMNITY COMPANY, a corpora-
tion,

Appellants,

vs.

WARREN H. PILLSBURY, Deputy Commis-
sioner for the Thirteenth Compensation
District of the Bureau of Employees
Compensation, Federal Security Agency
and LUELLA G. CAMPBELL, also known
as LUELLA G. KELLY, alleged widow of
WILLIAM ANGUS CAMPBELL, Deceased.

Appellees.

OPENING BRIEF OF APPELLANTS
MOORE DRY DOCK COMPANY AND
FIREMAN'S FUND INDEMNITY COMPANY

FILED

MAR 10 1948

LEONARD, HANNA & BROPHY,
465 California Street,
San Francisco 4,

Attorneys for Appellants.

PAUL P. O'BRIEN,

CLERK

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No. 11819

United States Circuit Court of Appeals
For the Ninth Circuit

MOORE DRY DOCK COMPANY and FIREMAN'S
FUND INDEMNITY COMPANY, a corpora-
tion,

Appellants,

vs.

WARREN H. PILLSBURY, Deputy Commis-
sioner for the Thirteenth Compensation
District of the Bureau of Employees
Compensation, Federal Security Agency
and LUELLA G. CAMPBELL, also known
as LUELLA G. KELLY, alleged widow of
WILLIAM ANGUS CAMPBELL, Deceased.

Appellees.

OPENING BRIEF OF APPELLANTS
MOORE DRY DOCK COMPANY AND
FIREMAN'S FUND INDEMNITY COMPANY

JURISDICTION

An application for benefits under the Longshore-
men's and Harbor Workers' Compensation Act
(United States Title 33, sections 900-950) was filed
by the appellee Luella G. Campbell, also known

as Luella G. Kelly on the ground that she was entitled to a widow's death benefit by reason of the death of William Angus Campbell. (R4) The latter was drowned on May 12, 1945, while in the course of his employment at Oakland, California, for the Moore Dry Dock Company. (R4) The Moore Dry Dock Company, as employer, and the Fireman's Fund Indemnity Company, as legal insurer of said employer for workmen's compensation benefits payable under the Longshoremen's and Harbor Workers' Compensation Act, were named as defendants by said claimant. (R4)

After a hearing in the matter before Deputy Commissioner Warren H. Pillsbury, (R4) and the taking of a deposition at Nanaimo, British Columbia, where the claimant resides, an award of a death benefit in favor of the claimant was made by the deputy commissioner on December 3, 1946. (R 25-28) Within thirty days thereafter, (as required by United States Code Title 33, section 921(a)), the appellants herein on December 31, 1946, filed their Complaint for Injunction (R 2-7) in the District Court of the United States, Northern District of California, Southern Division, which is the federal district court for the judicial district in which the injury occurred (as required by United States Code Title 33, section 921(b)).

The federal district court, through Judge Harris, granted an interlocutory injunction on March 11, 1947, (R 9) The same court on June 25, 1947, confirmed the award of the deputy commissioner. (R 11) Petition for Allowance of Ap-

peal (R 22) was filed by your appellants and Order Allowing Appeal was issued by the federal district court, through Judge Harris, on September 24, 1947. (R 21)

Jurisdiction of this court upon appeal is invoked under section 128(a) of the United States Judicial Code (28 U.S. Code 225).

STATEMENT OF THE CASE

William Angus Campbell was on the 12th day of May, 1945, in the employ of the Moore Dry Dock Company at Oakland, California, as a stage rigger, and was engaged in ship repair operations on a completed vessel in navigable waters of the United States. (R 4) On said date, Campbell sustained injury arising out of and in the course of his employment, resulting in immediate death, when he fell from the vessel to the water and was drowned. (R 4)

On the date of fatal injury, the Fireman's Fund Indemnity Company, under and by virtue of a contract with the Moore Dry Dock Company, insured said Moore Dry Dock Company against the liability imposed upon it by the provisions of the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. Code, sections 900-950). (R 4)

Within a year after the date of Campbell's death, Luella G. Campbell, also known as Luella G. Kelly, filed her claim with the appellee Warren H. Pillsbury, as deputy commissioner, against the appellants herein, for the purpose of recovering a widow's death benefit under the Longshoremen's

and Harbor Workers' Compensation Act. (R 4) Thereafter, the matter came on regularly for hearing before said deputy commissioner, the issues were joined, and evidence, both oral and documentary, was received and the matter submitted for decision. (R 4)

Thereafter, on the 3rd day of December, 1946, said Warren H. Pillsbury, deputy commissioner and appellee herein, filed in his office and served upon the parties to said proceedings a Compensation Order—Award of Death Benefit which is appended to this brief. (R 5, R 25-28)

On December 31, 1946, your appellants filed in the United States District Court, as hereinbefore set forth, a Complaint for Injunction seeking to have set aside the Compensation Order-Award of Death Benefit issued by the Deputy Commissioner on the grounds that same was not in accord with law in finding that the claimant and appellee, Luella G. Campbell, also known as Luella G. Kelly, was a legal dependent upon the deceased employee, William Angus Campbell, on May 12, 1945, and entitled to a death benefit at the rate of \$13.13 a week commencing with May 13, 1945, and continuing thereafter until the further order of the Deputy Commissioner. (R 2-7)

The salient facts of the case are as follows: The claimant, Luella G. Campbell, also known as Luella G. Kelly, was married to the deceased employee, William Angus Campbell, in British Columbia on February 8, 1922. (R 26) He left her on or about September 4, 1923 and came to the United

States. (R26) During the ensuing five months he wrote her on several occasions, but thereafter to the time of his death on May 12, 1945, did not communicate with her. Neither did he contribute after his departure to her support or to the support of their two children. (R 26-27)

The claimant, with some aid from the public authorities of British Columbia, supported herself and children during the fifteen years between 1923 and 1938. In the latter year without seeking or obtaining a divorce from Campbell, she married William James Kelly. (R 27) The ceremony was performed in British Columbia on May 14, 1938. (R 27) From that date to the present she has lived with and been supported by Kelly. (R 6)

The question presented by the above facts is as follows: Did the Deputy Commissioner commit an error of law in the granting to the claimant of a death benefit under the Longshoremen's' and Harbor Workers' Compensation Act? This point was raised by the appellants' Complaint for Injunction. (R 5-6)

SPECIFICATION OF ERROR

I.

That the United States District Court for the Northern District of California, Southern Division, erred in making and entering the order and decree dated June 25, 1947, denying your appellants' application for a mandatory injunction to restrain compensation order of the appellee, Deputy Commissioner Warren H. Pillsbury, filed by him as here-

inbefore set forth, on December 3, 1946; and in failing to vacate the award in favor of the appellee Luella G. Campbell, also known as Luella G. Kelly, which order and award, it is respectfully contended, are not in accordance with law. (R 18-19)

ARGUMENT OF THE CASE

The Facts Are Undisputed, But an Erroneous Application of the Law Has Been Made Thereto

A copy of the "Compensation Order—Award of Death Benefit" of the deputy commissioner is appended hereto for convenient reference. The pertinent portion thereof for the purpose of this case is as follows:

"That the claimant herein, Luella G. Campbell, also known as Luella G. Kelly, was born December 26th, 1903, and was married to the employee, William Angus Campbell, on February 8th, 1922. The said employee left claimant on or about September 4th, 1923. During the following period of five months he wrote her on several occasions and thereafter did not communicate with her to the time of his death. He did not after his departure contribute to her support or to the support of their two children; that such conduct constituted desertion of claimant by the said William Angus Campbell. In good faith and believing her husband, William Angus Campbell, to be dead, claimant married one William James Kelly on May 14th, 1933. At said time the said William Angus Campbell was still living. No divorce was ever had between claimant and William Angus

Campbell, that therefore claimant was still the wife of William Angus Campbell at the time of his death on May 12th, 1945, and that the said William Angus Campbell was still deserting her at said time. The claimant is entitled to a death benefit at the rate of \$13.13 a week commencing with May 13th, 1945, and payable at said rate in installments each two weeks or monthly at her election until the further order of the Deputy Commissioner * * *

The order of the deputy commissioner sets forth the facts of the case (which, as previously stated, are undisputed) and certain legal conclusions. Separately stated, these may be summarized as follows:

(1) THE FACTS—that Campbell left his wife in 1923 and did not thereafter see her or support her prior to his death in 1945; that she married Kelly in 1938 (through inadvertence this date is shown by the deputy commissioner as 1933), and thereafter lived with and was supported by Kelly.

(2) THE CONCLUSIONS OF LAW—that Campbell's conduct constituted desertion of claimant; that claimant was still the wife of Campbell at the time of his death in 1945 and that he was still deserting her at that time; that claimant is entitled to a death benefit under the provisions of the Longshoremen's and Harbor Workers' Compensation Act.

We have no quarrel with the facts as found by the deputy commissioner's decision. We do contend that the legal conclusions drawn do not warrant the award of a death benefit under the law.

It is elementary, of course, that the findings of *fact* of the deputy commissioner, when supported by substantial evidence, are to be regarded as final and conclusive and not subject to judicial review. *South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251; *Crowell v. Benson*, 285 U.S. 22. Likewise, logical deductions and inferences which may be drawn from the evidence by the deputy commissioner are to be regarded as final and not judicially reviewable. *Parker v. Motor Boat Sales, Inc.*, 314 U.S. 244; *Contractors, Pacific Naval Air Bases v. Pillsbury*, 150 Fed. 2d 310.

Recognizing these fundamental principles, we submit that this is not a case to which they have application. The *facts* of the instant case are not in controversy and are fairly set forth in the findings of the deputy commissioner. We refer, of course, to the findings of *fact* and *not* to the *conclusions of law* drawn from those undisputed facts.

We submit that there is no statute or rule of law which deprives the federal courts of the power to review the conclusions of law of a deputy commissioner. We respectfully submit that the federal courts have not only the power *but also the duty* to review and reverse errors of law committed by a deputy commissioner. Particularly is this true where the facts themselves are undisputed, and it is only the application thereto of the statutory provisions which is in controversy. We think the foregoing proposition is self-evident and too well established to require citation of authority (but see *Norton v. Warner Co.*, 321 U.S. 565, 568).

THE STATUTORY PROVISIONS

The statutory provisions of the Longshoremen's and Harbor Workers' Compensation Act which are pertinent to the dependency claim in this case are the following:

“Sec. 9. If the injury causes death, the compensation shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following:

(a) * * *

(b) If there be a surviving wife or dependent husband and no child of the deceased, to such wife or dependent husband 35 per centum of the average wages of the deceased during widowhood, or dependent widowerhood, with two years compensation in one sum upon remarriage; * * *

(f) All questions of dependency shall be determined at the time of the injury.

“Sec. 2(16). The term ‘widow’ includes only the decedent's wife living with or dependent for support upon him at the time of his death; or living apart for justifiable cause or by reason of his desertion at such time.”

From these provisions, it is at once apparent that the question of dependency must be determined on the basis of the situation which existed at the time of the fatal injury; namely May 12, 1945. It is also apparent that the claimant must, to qualify for recovery, bring herself within the provisions of Sec. 2(16) quoted above.

An analysis of that subdivision of the statute will indicate that not every surviving wife can qualify as a dependent. Congress and the framers of the Act obviously had in mind a definite limitation of surviving wives eligible to receive benefits to those with certain qualifications, excluding others. So there was placed in the subdivision the requirement that the term "widow" shall include *only* a surviving wife who is able to fulfill certain other requirements. *In addition to being the wife, she must also at the time of the husband's death have been*

(a) Living with him, or

(b) Dependent upon him for support, or

(c) Living apart from him for justifiable cause, or

(d) Living apart from him by reason of his desertion.

If an otherwise eligible surviving wife cannot show these additional qualifications, she does not become a "widow" within the meaning of Sec. 2(16) of the Act and therefore is not entitled to compensation. It is the contention of your appellants that the surviving wife in this case is unable to show any of these additional qualifications, as required by the statute, and that she is a member of the class of surviving wives which the framers of the Act, and Congress, intended for exclusion.

WHY IS THE CLAIMANT NOT QUALIFIED FOR BENEFITS?

Let us analyze the facts of the present case in the light of the statutory provisions, as set forth above. Mrs. Kelly was undoubtedly the wife of the decedent as a result of their marriage in 1922. Since there was no divorce, it follows that she may legally be deemed his surviving wife at the time of his death, as found by the deputy commissioner. But the possession of this status is only the first step toward eligibility for a death benefit under the Act.

We have seen heretofore that under Sec. 2(16) of the Act a "widow" is something more than the surviving wife of the decedent. She must possess one of a listed group of additional qualifications. Let us examine the admitted facts of this case to see whether the wife of the decedent qualified as a "widow" within the meaning of the Act.

(a) **LIVING WITH DECEDENT**—The first alternative which will render a wife a "widow" within the meaning of the law is that she was living with her husband at the time of his death. This possibility may be quickly dismissed in the instant case, for it is obvious from the record, and conceded by the claimant, that she did not live with her first husband at the time of his death nor for 22 years theretofore.

(b) **DEPENDENT FOR SUPPORT**—The second alternative may also be disposed of without difficulty. The claimant not only was not dependent upon the decedent for support when he died, but had received no support from him for over twenty years.

On the contrary, during the seven years preceding the death of her first husband, she had been supported by her second husband, William James Kelly, with whom she still lives and by whom she is still supported. The obvious purpose of this provision of the law is to protect those wives who *are* supported by their husbands, but for one reason or another do not share the same abode.

(c) LIVING APART FOR JUSTIFIABLE CAUSE—
There is no evidence in the instant case that the claimant was “living apart” from her first husband “for justifiable cause.” This provision of the law protects a wife who has been forced by the husband’s misconduct to leave his bed and board, and who therefore is not living with him or being supported by him. The provision obviously was not applicable to the facts of this case, and the findings of the deputy commissioner ascribe the separation of the couple to other causes; to wit, desertion by the decedent husband.

(d) LIVING APART BY REASON OF DESERTION—
The record and findings of the deputy commissioner make it plain that alternatives (a) residence with the husband at time of death, (b) dependence upon husband for support at time of death, and (c) living apart from husband at time of death for justifiable cause are without application to this case. On the other hand, the nature of the facts and the findings of the deputy commissioner make it apparent that alternative (d) “living apart” from the husband at the time of his death “by reason of his desertion” is the basis of the decision and award.

The findings say “ * * * that such conduct constituted desertion of the claimant by the said William Angus Campbell * * * and that the said William Angus Campbell was still deserting her at said time * * * ” (referring to the time of his death).

Since this is the fourth and last alternative, the right of the claimant to benefits must stand or fall on her ability to show that at the time of her first husband's death, she was “living apart * * * by reason of his desertion.” We will demonstrate, both on the basis of logic and precedent, that the claimant has *not* brought herself within the meaning of this provision of the law.

An examination of the statute [Sec. 2(16)] discloses the fact that it is not sufficient for the wife to have been deserted by her husband to qualify her for benefits. There is the further requirement that she must have been “living apart” from him at the time of his death “by reason of his desertion.” In other words, the status of the wife is *not* permanently and irrevocably fixed by the act of her husband's desertion, regardless of what the wife may thereafter do. Query: then to what extent can a deserted wife vary her eligibility for dependency, and by what acts on her part?

THE SIGNIFICANCE OF “LIVING APART”—To begin our analysis, let us give consideration to the words “living apart” in Sec. 2(16) and their significance. This participial phrase has reference to something *the wife* does, and describes a mode of life to be followed by her. The statute, it will be observed, does not require merely an act by the husband in

the form of a continuing desertion. It also requires something of the wife; namely, that she be "living apart." Furthermore, it requires of her that she be living apart, not only at the time of the husband's death, but "for justifiable cause or by reason of his desertion at such time." The words of the statute make it plain, therefore, that action by the husband alone is not the criterion of the dependency claim; there must also be action by the wife at a given time and for specified reasons.

To the words "living apart" must be given the reasonably intended connotation. In using them, Congress seems to have intended to create a status of dependency in a deserted wife so long as she remains in a separated condition. The facts of the instant case show that the claimant was not "living apart" from her first husband at the time of his death either for justifiable cause or by reason of his desertion. In fact, she had ceased "living apart" from him in 1938, when she became Mrs. Kelly and ceased to be the abandoned Mrs. Campbell. Her status between 1938 and 1945, rather than being the negative one of "*living apart*" from the decedent, had become the affirmative one of *living with* Kelly as his wife. She no longer held herself out to the world as "living apart" from Campbell for any reason, whether for justifiable cause or by reason of his desertion. She abandoned that position when she adopted a new marital status.

Thus it becomes apparent that the claimant was no longer "living apart" from decedent at the time of his death, nor at any time after the second

marriage. It would be an absurdity to say that she was "living apart" from her first husband at the same time that she was admittedly living with her second husband. The two statuses are incompatible, one with the other. The new relationship was in derogation of the old, and became the *independent cause* of her not living with the decedent at the time of his death.

CLAIMANT'S REMARRIAGE BARS HER RIGHT TO COMPENSATION

It is the view of the federal courts that remarriage of a claimant living apart from her husband bars her right to collect a death benefit award under the Longshoremen's Act. This rule has been recently enunciated by the 5th Circuit Court of Appeals in the only case ever squarely to involve that point (which is the exact point involved in the instant case). *Ryan Stevedoring Company v. Henderson*, 138 Fed. 2d 348 (1943).

The facts in the *Ryan Stevedoring Company* case, *supra*, were that the employee, W. M. Sills, and Sarah Sills were married in 1926. In 1928 she separated from him for justifiable cause and some years later married William Johnson without obtaining a divorce from Sills. After 3½ years of this marital relationship with Johnson, she left him. When Sills suffered a fatal compensable injury about 1940, she sought to recover a death benefit under the Longshoremen's Act. The court said:

"The evidence clearly shows that the original separation was for justifiable cause and that such

justifiable cause continued for a long time after the separation. We think, however, that it cannot be said that at the time of W. M. Sills' death she was then living apart for justifiable cause, for there had intervened the bigamous marriage of Sarah Sills to William Johnson, and for three and one-half years she had lived with Johnson, holding herself out as his wife. The bigamous marriage brought to an end the period of separation for justifiable cause and Sarah Sills thereby forfeited any rights she had to recover benefits in the event of her lawful husband's death. Any other holding would do violence to the spirit and purpose of the Act. (Citations.)

“On the facts it cannot be held that the claimant was living apart from her husband at the time of his death for justifiable cause. The compensation order was not in accordance with law, and the District Court should have set it aside. The judgment is reversed and the cause is remanded for further proceedings in conformity herewith.”

THE FACTOR OF MISCONDUCT ON THE CLAIMANT'S PART IS A FALSE QUANTITY IN THE CASE

Some courts have adopted the rule that misconduct of a deserted wife with another man will not deprive her of a right to a death benefit. *Travelers Ins. Co. v. Norton*, 34 F. Supp. 740; *Associated Operating Co. v. Lowe*, 52 F. Supp. 550. These two district court opinions have applied the rule to cases under the Longshoremen's Act. Opposed to this view is the late circuit court opinion in *Amer. Mut. Liab. Ins. Co. v. Henderson*, 141 F. 2d 813.

The two district court cases cited in the preceding paragraph go off on the theory of the possible effect of wrong-doing on the part of the deserted wife. We have no particular fault to find with the theory that mere misconduct of the separated wife produces no change in the legal status of the parties, nor with a rule that such deserted wife shall not be penalized for indulgence in amours during the desertion period.

But such a theory has no application to the facts of the instant case. The factor of wrongdoing is entirely a false quantity in the present situation. There is no evidence to indicate any wrongdoing on the part of this claimant, and the deputy commissioner specifically found that she acted in good faith in entering into her second marriage. We, therefore, see no relevancy to the present case in decisions, whether of the federal or other courts, which turn on the fact of misconduct or wrongdoing on the part of the abandoned wife.

The rule in the *Ryan* case, *supra*, is therefore not merely the only determination of this particular question by an American court, federal or state. It presents the only rational solution of the problem, and the only solution which avoids doing violence to a sense of logic and fair play, as well as to the spirit and purpose of the Act.

**A CHANGE IN MARITAL STATUS TERMINATES THE
PERIOD OF DESERTION OR SEPARATION FOR
JUSTIFIABLE CAUSE**

As demonstrated in the preceding discussion, we are not dealing with a case wherein the abandoned

wife is sought to be penalized for her moral derelictions. This is a situation where she has forsaken the status of abandoned wife and has in good faith embarked on a new marital career.

Without question, an abandoned wife can take steps to terminate her status as one deserted, for example by divorce, or by refusal of an offer to resume the marital status. We believe the steps taken by this claimant constituted a valid termination of her status as a *deserted* wife, whether or not it ended her primary status as legal wife of the decedent. We believe the same holds true as to the effect of such steps on termination of the status of "living apart" for reasons specified by the statute.

The marriage to Kelly was an overt act signaling a new status—an act by which the claimant made known to the world *her* abandonment of the status of deserted wife. Even more clearly than by refusal to resume an offer by the decedent to resume marital relations, the claimant by her second marriage signified the termination of her relationship to decedent. Such a refusal to resume the original relationship would have been a matter of private conversation or correspondence between parties, but the second marriage to Kelly was by contrast a matter of public record and notice. The intentions of the claimant cannot be the subject of doubt under such conditions.

Furthermore, the claimant's second marriage was a *permanent* move on her part, not one lightly to be cast aside, as in case of a temporary alliance or

“without benefit of clergy” affair with some other man. In the latter type of cases, it can well be argued that the wife’s behavior during the desertion period effectuates no change in her relationship to the decedent, and indicates no intent to alter her position as a deserted wife. In the instant case, the claimant deliberately and formally changed her status and ceased living apart from decedent, not “by reason of his desertion” or “for justifiable cause,” *but because she thought he was dead and was told by her lawyer that it was proper to remarry*. With that remarriage she wrote *finis* to one chapter of her life and commenced another.

We submit that the distinction involved is decisive. The mere fact that a deserted wife may drift into an informal liaison with another man is not necessarily fatal to her right to an award. But the fact that she takes a *formal step* (by means of marriage vows) to enter a new relationship is notice to the world that she has ended the old relationship. Under such circumstances, as the court so aptly put it in the *Ryan* case, *supra*, “ * * * it cannot be held that the claimant was living apart from her husband *at the time of his death* for justifiable cause.” (Emphasis added.)

Nor can it avail the claimant anything to argue that she never lost her status as decedent’s wife because her second marriage was void. While the second marriage could not terminate her status as legal wife of the decedent, *it could and clearly did terminate her status as a deserted wife*. Also, it ended the period of “living apart” from husband

No. 1.

INSUFFICIENCY OF DEPUTY COMMISSIONER'S FINDINGS

The deputy commissioner found that the acts and conduct of decedent Campbell constituted desertion of the claimant, that the claimant was still the wife of Campbell at the time of his death, and that Campbell was still deserting her at said time. In this connection, it is worthy of note and perhaps highly significant that the deputy commissioner contented himself with the foregoing findings. He did not assert, and could not have asserted on the basis of the record, that the claimant was "living apart" from Campbell at the time of his death "for justifiable cause or by reason of his desertion." As we have shown before, the phrase "living apart" did not after 1938 properly describe the status of Mrs. Kelly; and if it be deemed, nevertheless, that she was "living apart" from Campbell *after* she became Mrs. Kelly, it was *not* by reason of her desertion by Campbell, but because she acquired a new marital status as Mrs. Kelly.

Likewise, the deputy commissioner failed to make any finding with respect to termination of payments by reason of the second marriage. Sec. 9(b) of the Act provides that the payment to a surviving wife who remarries shall be "two years compensation in one sum upon remarriage." The decision of the deputy commissioner completely ignores this provision of the law. Despite the remarriage of the claimant, and the fact that she continues to this very date in her status as Mrs. Kelly, the award makes no provision for a lump sum two-year payment to

her. The attention of the court is directed to the fact that Sec. 9(b) of the Act provides that payments to a surviving wife shall continue only "during widowhood." It is thus apparent that Congress intended the right to benefits to end upon remarriage. In this case, remarriage was seven years before the death of the decedent, and the period of widowhood had ended before it began.

In the case of *Williams v. Lawson*, 35 F. 2d 346, the federal court aptly said: "A preceding section of the Act (referring to Section 2(16)) having defined the word 'widow' when used in the Act, it is to be inferred that an intended effect of making the prescribed compensation payable 'during widowhood' was to keep the right provided for from accruing in favor of one who was the wife of the deceased employee at the time of his death, *but whose state or condition at that time was not that of a widow as defined in Section 2 of the act.*" (Emphasis added.)

RECAPITULATION

In summary, we submit that—

(1) The facts are undisputed, but the case is properly reviewable because of an erroneous application of the law to such undisputed facts.

(2) The applicable sections of the Longshoremen's Act exclude dependency of this claimant unless it can be shown that she was "living apart" for justifiable cause or by reason of desertion by decedent at the time of his death.

(3) But claimant was not "living apart" for either of these reasons, but for a new and independent reason—her marriage to Kelly.

(4) The only case "on all fours" holds the right to benefits barred in such a situation.

(5) Cases which hold that misconduct of a deserted wife is not fatal to her claim for a death benefit have no application to the problem in this case, as they deal with a different factual situation.

(6) A change in marital status, such as occurred in this case, may not terminate the status of the claimant as decedent's legal wife, but it effectually terminates her status as a wife deserted.

(7) An analysis of the statute shows clearly that a termination of the status of living apart by reason of the husband's desertion is sufficient to disqualify the claimant as one entitled to benefits.

(8) Thus, statutory analysis unites with precedent to demand a rational solution of this problem and one which will not "do violence to the spirit and purpose of the Act."

Wherefore, it is respectfully urged that appellants' be granted the relief asked in their complaint for injunction.

Respectfully submitted,

.....

Attorneys for Appellants.

Federal Security Agency
Bureau of Employees Compensation
13th Compensation District

Case No. 8-1620

Claim 2539

In the matter of the claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act.

LUELLA G. CAMPBELL, also known as
LUELLA G. KELLY, Widow of
WILLIAM ANGUS CAMPBELL, Deceased,
Claimant.

against

MOORE DRY DOCK COMPANY,
Employer,

FIREMAN'S FUND INDEMNITY COMPANY,
Insurance Carrier.

**COMPENSATION OF ORDER
AWARD OF DEATH BENEFIT**

Such investigation in respect to the above entitled claim having been made as is considered necessary, and a hearing having been duly held in conformity with law, the Deputy Commissioner makes the following:

FINDINGS OF FACT

That on the 12th day of May 1945 William Campbell, husband of the claimant herein, was in the employ of the employer above named at Oakland, in the State of California, in the 13th Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under said Act was insured by Fireman's Fund Indemnity Company;

That on said day the said employee while performing service for the employer as a stage rigger and engaged in ship repair operations on a completed vessel on navigable waters of the United States at said harbor, sustained personal injury occurring in the course of and arising out of his employment, and resulting in immediate death as follows: He fell from the vessel into the water and was drowned;

That the average annual earnings of the employee herein at the time of his injury are not determined, and a determination thereof is deferred until later necessity arises, that the average weekly wage is admitted to exceed \$37.50;

That the claimant herein, Luella G. Campbell also known as Luella G. Kelly, was born December 26th, 1903, and was married to the employee, William Angus Campbell, on February 8th, 1922. The said employee left claimant on or about September 4th, 1923. During the following period of five

months he wrote her on several occasions and thereafter did not communicate with her to the time of his death. He did not after his departure contribute to her support or to the support of their two children; that such conduct constituted desertion of claimant by the said William Angus Campbell. In good faith and believing her husband, William Angus Campbell, to be dead, claimant married one William James Kelly on May 14th, 1933. At said time the said William Angus Campbell was still living. No divorce was ever had between claimant and William Angus Campbell, that therefore claimant was still the wife of William Angus Campbell at the time of his death on May 12th, 1945, and that the said William Angus Campbell was still deserting her at said time. That claimant is entitled to a death benefit at the rate of \$13.13 a week commencing with May 13th, 1945, and payable at said rate in installments each two weeks or monthly at her election until further order of the Deputy Commissioner. That the children of the said William Angus Campbell had reached the age of 18 years prior to the time of his death.

The claimant's attorney, Mr. Victor B. Harrison, has rendered service to claimant in the prosecution of her claim of the reasonable value of \$150.00, and is entitled to a lien therefor upon compensation herein awarded.

Upon the foregoing facts, the Deputy Commissioner makes the following:

AWARD

That the employer, Moore Dry Dock Company, and its insurance carrier, Fireman's Fund Indemnity Company, shall pay to the claimant compensation as follows:

To claimant, Luella G. Campbell, also known as Luella G. Kelly, the sum of \$13.13 a week payable in installments each two weeks or monthly at her election beginning with May 13, 1945, until the further order of the Deputy Commissioner, less however the sum of \$150.00 to be deducted from said payments and paid by defendants to said Victor B. Harrison upon his lien for attorney's fees.

Given under my hand at San Francisco, California, this 3rd day of December, 1946.

WARREN H. PILLSBURY,
Deputy Commissioner,
13th Compensation District.

WHP:a:mac

No. 11,819

IN THE

**United States Circuit Court of Appeals
For the Ninth Circuit**

MOORE DRY DOCK COMPANY and FIREMAN'S
FUND INDEMNITY COMPANY, a corpora-
tion,

Appellants,

vs.

WARREN H. PILLSBURY, Deputy Commis-
sioner for the Thirteenth Compensation
District of the Bureau of Employees'
Compensation, Federal Security Agency
and LUELLA G. CAMPBELL, also known as
LUELLA G. KELLY, alleged widow of
WILLIAM ANGUS CAMPBELL, deceased,

Appellees.

Appeal from the District Court of the United States for the
Northern District of California, Southern Division.

BRIEF FOR APPELLEE DEPUTY COMMISSIONER PILLSBURY.

FRANK J. HENNESSY,

United States Attorney,

DANIEL C. DEASY,

Assistant United States Attorney,
Post Office Building, San Francisco 1, California,

Proctors for Appellee Pillsbury.

WARD E. BOOTE,

Chief Counsel

Bureau of Employees' Compensation
Federal Security Agency

HERBERT P. MILLER,

Assistant Chief Counsel

Of Counsel.

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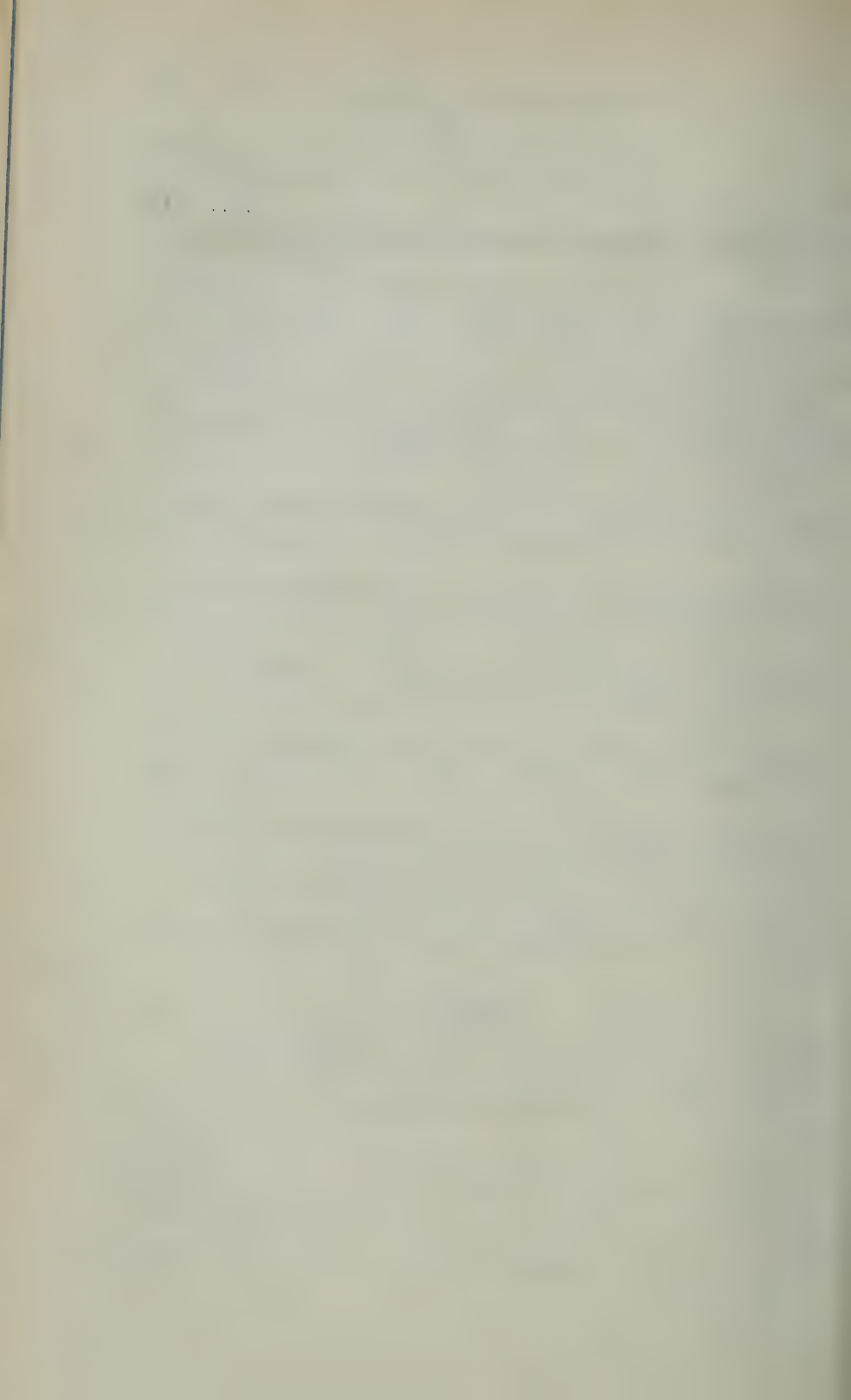
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No. 11,819

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

MOORE DRY DOCK COMPANY and FIREMAN'S
FUND INDEMNITY COMPANY, a corpora-
tion,

Appellants,

vs.

WARREN H. PILLSBURY, Deputy Commis-
sioner for the Thirteenth Compensation
District of the Bureau of Employees'
Compensation, Federal Security Agency
and LUELLA G. CAMPBELL, also known as
LUELLA G. KELLY, alleged widow of
WILLIAM ANGUS CAMPBELL, deceased,

Appellees.

Appeal from the District Court of the United States for the
Northern District of California, Southern Division.

BRIEF FOR APPELLEE DEPUTY COMMISSIONER PILLSBURY.

STATEMENT OF CASE.

This is an appeal from an order of the United States District Court for the Northern District of California, Southern Division, Honorable George B. Harris, District Judge, confirming a compensation order of the

deputy commissioner filed on December 3, 1946, in which he awarded compensation to Luella G. Campbell, (hereinafter called "claimant"), upon the death of her husband, William Angus Campbell, who sustained fatal injuries on May 12, 1945, in the course of his employment by the appellant Moore Dry Dock Company. The said compensation order was issued by the deputy commissioner pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927 (44 Stat. 1424, U.S.C. Title 33, Chap. 18, sec. 901, *et seq.*). The compensation liability of the employer was insured by the appellant Fireman's Fund Indemnity Company.

The employer and carrier controverted the widow's claim for compensation upon the ground that she was not the widow of the deceased employee within the meaning of the Longshoremen's Act. The deputy commissioner held a hearing on March 18, 1946 (appellants have not included any of the evidence in their printed record on appeal), and upon the evidence adduced at said hearing found that Luella G. Campbell was the widow of the deceased employee and entitled to compensation as such. In the compensation order the deputy commissioner found the facts to be as follows:

"That the claimant herein, Luella G. Campbell also known as Luella G. Kelly, was born December 26th, 1903 and was married to the employee, William Angus Campbell, on February 8th, 1922. The said employee left claimant on or about September 4th, 1923. During the following period of five months he wrote her on

several occasions and thereafter did not communicate with her to the time of his death. He did not after his departure contribute to her support or to the support of their two children; that such conduct constituted desertion of claimant by the said William Angus Campbell. In good faith and believing her husband, William Angus Campbell, to be dead, claimant married one William James Kelly on May 14th, 1938. At said time the said William Angus Campbell was still living. No divorce was ever had between claimant and William Angus Campbell, that therefore claimant was still the wife of William Angus Campbell at the time of his death on May 12th, 1945 and that the said William Angus Campbell was still deserting her at said time”.

The employer and carrier thereupon instituted a proceeding for judicial review of the compensation order pursuant to the provisions of Section 21 (b) of the Longshoremen's Act (33 U.S.C.A. section 921 (b)) alleging in substance that the compensation order was not in accordance with law because the deputy commissioner's finding that Luella G. Campbell was the widow of the deceased employee was not supported by evidence (R. 5).

The court below by order entered on June 25, 1947, sustained the award of the deputy commissioner and it is from said order that this appeal is taken.

ARGUMENT.

I.

THE DEPUTY COMMISSIONER'S INFERENCE THAT CLAIMANT WAS THE DESERTED WIFE OF THE DECEASED EMPLOYEE IS SUPPORTED BY EVIDENCE.

Appellants contend in their brief (pages 4, 5) that the deputy commissioner's findings to the effect "that Campbell's conduct constituted desertion of claimant; that claimant was still the wife of Campbell at the time of his death in 1945, and that he was still deserting her at that time" are "conclusions of law", which the courts have the "duty to review * * * particularly * * * where the facts themselves are undisputed, and it is only the application thereto to the statutory provisions which is in controversy".

This contention of appellants is almost the antithesis of a recent pronouncement of the Supreme Court in the case of *Cardillo, deputy commissioner v. Liberty Mutual Insurance Company*, 330 U. S. 469, 478 (1947) where it stated:

"It matters not that the basic facts from which the Deputy Commissioner draws this inference are undisputed rather than controverted. See *Boehm v. Commissioner*, 326 U. S. 287, 293. It is likewise immaterial that the facts permit the drawing of diverse inferences. The Deputy Commissioner alone is charged with the duty of initially selecting the inference which seems most reasonable and his choice, if otherwise sustainable, may not be disturbed by a reviewing court. *Del Vecchio v. Bowers, supra*, 287. Moreover, the fact that the inference of the type here made by the Deputy Commissioner involves an application

of a broad statutory term or phrase to a specific set of facts gives rise to no greater scope of judicial review. *Labor Board v. Hearst Publications*, 322 U. S. 111, 131; *Commissioner v. Scottish American Co.*, 323 U. S. 119, 124; *Unemployment Compensation Commission v. Aragon*, 329 U. S. 143, 153-154. Even if such an inference be considered more legal than factual in nature, the reviewing court's function is exhausted when it becomes evident that the Deputy Commissioner's choice has substantial roots in the evidence and is not forbidden by the law. Such is the result of the statutory provision permitting the suspension or setting aside of compensation orders only 'if not in accordance with law'.

"Our attention must therefore be cast upon the inference drawn by the Deputy Commissioner in this case that Ticer's injury and death did arise out of and in the course of his employment. If there is factual and legal support for that conclusion, our task is at an end".

Accord: *Gray v. Powell*, 314 U. S. 402, 412 (1941).

Whether the deceased employee deserted claimant and whether the status of deserted wife continued to the date of death, although the wife innocently (her good faith was also a matter for the deputy commissioner to determine) went through a void marriage ceremony 15 years after the desertion were inferences for the deputy commissioner to draw from the evidence.

To say that there was no factual and legal support for the deputy commissioner's conclusion (inference)

that claimant was the deserted wife of the deceased employee would be to disregard the evidence and the definition of "widow" in the Act itself.

"The term 'widow' includes only the decedent's wife living with or dependent for support upon him at the time of his death; or living apart for justifiable cause or by reason of his desertion at such time".

Since the term "widow" is defined in the Act itself, it is axiomatic that any other definition in any other statute or for any other purpose is of no influence or control. *Weyerhaeuser Timber Co., et al. v. Marshall, deputy commissioner*, 102 F. (2d) 78, 81 (C.C.A. 9, 1939); compare *Baltimore & Ohio R.R. Co. v. Clarke, deputy commissioner*, 59 F. (2d) 595 (C.C.A. 4, 1932); *Middleton v. Luckenbach S. S. Co., Inc., et al.*, 70 F. (2d) 326 (C.C.A. 2, 1934). The definition quoted above gives *four categories* or alternative conditions under which the surviving wife is entitled to compensation—they are:

1. A surviving wife who was living with decedent at the time of his death.
2. A surviving wife (not living with but) who was dependent for support upon decedent at the time of his death.
3. A surviving wife who was living apart from decedent for justifiable cause at the time of his death.
4. A surviving wife who was living apart from decedent by reason of his desertion at the time of his death.

The claimant as the surviving wife in the present case would be entitled to compensation if the conditions of either one of the above categories were fulfilled. (The complaint does not allege, and indeed it would be futile to allege, that claimant was not the 'surviving wife' of the deceased in view of the uncontradicted evidence that she married the deceased on February 8, 1922 and that said marriage had never been dissolved—see exhibit A attached to transcript of testimony before the deputy commissioner. The deputy commissioner found and the evidence supports the finding, that deceased deserted claimant on or about September 4, 1923 and that said desertion continued until the deceased's death (category 4 above).

At the hearing on March 18, 1946 before the deputy commissioner, Exhibit "A" was received in evidence (T. 7). It consisted of an affidavit by the claimant dated February 8, 1946, with attached documents.

It appears from the said affidavit and documents attached thereto that claimant was married to deceased on February 8, 1922; that deceased deserted claimant and their children on or about September 4, 1923; that he wrote to her for five months thereafter on several occasions but not subsequently thereto until his death; that claimant made many inquiries to ascertain deceased's whereabouts but no trace of him was found until his death; that claimant and her children were supported by public aid; that claimant believing deceased to be dead, went through a marriage ceremony with William James Kelly on May 14, 1938, which was 15 years after deceased's desertion.

II.

MARRIAGE CEREMONY ENTERED INTO BY CLAIMANT SUBSEQUENT TO THE DESERTION IN BELIEF THAT HER HUSBAND WAS DEAD DID NOT CHANGE HER STATUS.

It is alleged, in effect, in paragraph X of the complaint that the claimant is not entitled to compensation (although admittedly she is the surviving wife who was deserted by the deceased) (a) because she had not been supported by the deceased for more than 20 years before his death, and (b) because of her marriage to William Kelly subsequent to her desertion by the deceased. As to (a) it is obvious, that *it is not necessary that she should have been supported by her husband in order to qualify as widow within the meaning of the Act*, as dependency is not an element of any of the categories or alternative conditions (*supra*) under which a surviving wife is entitled to compensation except category 2, which is not here involved. Category 4 *supra* requires only that the surviving wife *be living apart by reason of the husband's desertion*. As to (b) the sole question remains whether or not the subsequent marriage ceremony which the deserted wife, entered into under the circumstances of the present case, bars her right to compensation.

The prevailing view is that the conduct of the wife, subsequent to the desertion by her husband, such as adultery or invalid marriage, does not of itself defeat her right to compensation for the death of her husband. *Travelers Insurance Co. v. Norton*, deputy commissioner, 34 F. Supp. 740 (Pa. 1940); *Associated Operating Company v. Lowe*, deputy commissioner,

52 F. Supp. 550, affirmed 138 F. (2d) 916 (C.C.A. 2, 1943); *Gilliam v. Southern Ry. Co.*, 93 S.E. 865, 108 S.C. 195 (1917); *Williams v. American Mutual Liability Insurance Company*, 33 S.E. (2d) 451, 72 Ga. App. 205 (1945); *Layman-Calloway Coal Company v. Martin*, 273 S.W. 496, 209 Ky. 690 (1925); *Sims v. American Mutual Liability Insurance Company*, 200 S.E. 164, 59 Ga. App. 170 (1938); *contra Ryan Stevedoring Co., Inc. v. Henderson, deputy commissioner*, 138 F. (2d) 348 (C.C.A. 5, 1943); *American Mutual Liability Ins. Co. v. Henderson, deputy commissioner*, 141 F. (2d) 813 (C.C.A. 5, 1944).

In *Travelers Insurance Co. v. Norton, deputy commissioner, supra*, in upholding an award the court said:

“Plaintiff’s complaint, however, is based upon the following stipulation of facts agreed to by counsel: ‘(1) That the claimant, Pauline Peterson, has lived with a man other than Charles Peterson for the past six years and at the address already appearing of record (276 Carnation Ave., Floral Park, L. I., N.Y.); (2) that during the course of this time, the said Pauline Peterson has held herself out as the wife of the man with whom she has been living; has used his name and has been known in the community as his wife.’ Because of these facts, plaintiff urges that the commissioner’s award should be set aside as contrary to law.

“Section 2(16) of the Longshoremen’s and Harbor Workers’ Compensation Act, 33 U.S.C.A. sec. 902(16) provides that ‘The term “widow” includes only the decedent’s wife living with or

dependent for support upon him at the time of his death; or living apart for justifiable cause or by reason of his desertion at such time'. The commissioner's award was predicated upon the finding that Pauline S. Peterson, *the deceased's lawful wife, at the time of his death was living apart from him for justifiable cause and by reason of his desertion*. Plaintiff, however, would have the statute interpreted so as to bar recovery to a wife who, *because of her own wrongdoing*, was not entitled to support from her husband at the time of his injury, citing for this proposition *Polokow Corp. v. Industrial Comm.*, 336 Ill. 395, 168 N.E. 271. However, the state workmen's compensation law involved therein specifically limited recovery to 'any widow * * * whom he [the deceased employee] was under legal obligations to support at the time of his injury'. *Smith-Hurd Ann. St. Ch. 48 sec. 144(a)*. The desirability of such a statutory provision may readily be conceded. Nevertheless, had Congress intended that such a rule govern awards of compensation under the Longshoremen's and Harbor Workers' Compensation Act, *supra*, it could have stated so explicitly. To read such a provision into an unambiguous statute would exceed the proper bounds of the judicial function. I am unable to concur in the construction of the statute proffered by the plaintiff." (Emphasis supplied).

In *Associated Operating Company v. Lowe*, deputy commissioner, *supra*, the court said:

"Plaintiffs contend that the misconduct of the said defendant deprived her of the right to be considered as the widow of the deceased, and at-

tempts to sustain that contention, by citing cases relating to divorce. The answer to that is, that this case in no way involves a divorce, and such citations are not in point.

"We are not here dealing with a case under the different compensation laws of the States, but simply with the law in question, which does not provide for inquiry, after abandonment, into the wife's subsequent life and conduct."

"There has been but one case so far, as I have been informed or have ascertained, in the Federal Courts, on the question here involved, and that is directly in point. *Travelers Ins. Co. v. Norton, Deputy Com'r, et al.*, D. C., 32 F. Supp. 501.

"In that case the United States District Court, Eastern District of Pennsylvania, sustained the award to the widow, notwithstanding her alleged misconduct.

"In the Peterson case (*Travelers Ins. Co. v. Norton*), the Court, in an opinion reported in D. C., 34 F. Supp. 740, denied a motion for a permanent injunction.

"From these decisions it clearly appears that the finding of the Deputy Commissioner that the individual defendant was the deceased man's lawful wife at the time of his death, and living apart from him for justifiable cause, was a finding of fact supported by substantial evidence, which the Court was bound to accept. It was further held that *the wrong-doing of the wife, after she commenced to live apart for justifiable cause, did not deprive her of the right to compensation as the widow of the deceased, under the Statute here in question.*

“With the reasoning of those opinions I am in entire accord, and I do not find it necessary to repeat that reasoning here.” (Emphasis supplied).

In *Gilliam v. Southern Railway Company, supra*, the court said:

“After having lived with his wife about a year, he abandoned her and his child. There was no evidence that he afterwards contributed anything to the support of either of them; nor was there any evidence that he did not, except as that was inferable from the fact that he had not lived with them or communicated with them. There was evidence that, *after he abandoned her*, his wife lived in the house with another man, and that she had another child. * * * The Evidence did not warrant the Court in upholding as a matter of law, that the wife had forfeited the right to support by her conduct.” (Emphasis supplied.)

In *Layman-Calloway Coal Company v. Martin, supra*, the court said:

“Appellee and the deceased employee were husband and wife. After living together some four or five months as such * * * her husband abandoned her. They lived apart approximately four years before deceased was killed. Some two years after the separation appellee gave birth to an illegitimate child. That fact was held by the Board to operate as a voluntary abandonment by the wife of the husband and because of it the award was refused her.

“* * * So far as this record discloses and it is found by the Board, *the wife was wholly without fault at the time she was abandoned by her hus-*

band; and the fact that they ceased to live together as husband and wife cannot be said to have resulted because she voluntarily abandoned him.

* * *

“* * * *He abandoned her and in so far as the record discloses never offered or gave her the opportunity to resume marital relations. The statute does not provide for inquiry into the wife’s subsequent life and conduct. The sole rule for determining the question here presented, as fixed by the statute, is by inquiry into whether or not the wife had voluntarily abandoned her husband. If the Legislature had seen fit to make the conduct or misconduct of the wife, subsequent to her husband’s abandonment of her, determinative of the question, it might have done so.*” (Emphasis supplied.)

In *Williams v. American Mutual Liability Insurance Company*, *supra*, the court said:

“We think that the principle in this kind of case is analogous to the law of descent and we do not know of any law which bars the right of the wife to inherit from her husband by reason of her adultery or a bigamous marriage.”

In *Sims v. American Mutual Liability Insurance Company*, *supra*, the court said:

“* * * *The evidence shows that the separation was caused by the deceased’s desertion of Bertha Sims through no fault of hers, and there is no evidence that he ever offered to have her return to him. * * * Under the circumstances Bertha Sims was continuously abandoned and it was not possible for her to abandon her husband after she*

had already been abandoned by him. Any refusal on her part to go back to him would have been an abandonment, but no such refusal was proved. Compensation should have been awarded to her under the law.” (Emphasis supplied.)

However, assuming *arguendo* that the two decisions in the fifth circuit, *Ryan Stevedoring Co. v. Henderson, supra*, and *American Mutual Liability Ins. Co. v. Henderson, supra*, are correct, namely, that the *misconduct* of the wife subsequent to her desertion by the husband does bar her right to compensation and all the other decisions to the contrary are in error, the instant case does not come within the purview of the two decisions in the fifth circuit for the reason that the wife in the instant case *was not guilty of any misconduct*; the evidence is uncontradicted that she went through a marriage ceremony 15 years after the desertion in the belief that her husband was dead. In the two cases in the fifth circuit, one of the wives cohabited with another man with the full knowledge that her husband was living and in the other case the wife entered a bigamous marriage with like knowledge. However, it is repeated that the decisions in that circuit are in the minority *even under circumstances involving misconduct*.

There is a case under the New York Compensation Law, which appears to be similar to the case at bar in point of fact. In *Van Wyk v. Realty Traders*, 215 App. Div. 254, 213 N.Y.S. 28 (1926), a deserted wife believing her husband to be dead entered into another marriage ceremony. The husband subsequently was

fatally injured in the course of employment. The court upheld an award to her as the widow and said in part:

“*Actual dependency is not a condition to the right of a surviving wife to death benefits under section 16 of the Workmen’s Compensation Law.* * * * The marriage contract between claimant and deceased had not been dissolved at the time of his death. They became husband and wife in the eyes of the law. *Her marriage in the State of Washington was apparently entered into in good faith on the supposition that her first husband was dead* * * *. At common law the remarriage of one having a husband or wife actually living although unheard of for years and believed to be dead is void *ab initio*.” (Emphasis supplied.)

The cases which hold that the subsequent attempted marriage of a wife after desertion does not bar her right to compensation are consistent with the rule that the “marriage between persons one of whom is married to another, although he or she has been deserted by his or her spouse is void, generally by express statutory provision and not merely voidable. It is good for no legal purpose”. 35 Amer. Jur. Sec. 148; *Van Wyk v. Realty Traders*, 213 N.Y.S. 28, 215 App. Div. 254.

III.

APPELLANTS' BRIEF.

Appellants state (page 12) that claimant was not "living apart" from her deceased husband at the time of the latter's death because of the fact that she was living with her second "husband". It is difficult to see the connection between the premise and the conclusion and appellants apparently also find similar difficulty for in the next sentence they state that the new relationship became the independent cause of her "*not living with the decedent*" which is another way of saying that she was *living apart* from decedent.

Appellants state in their brief (page 17):

"Likewise, the deputy commissioner failed to make any finding with respect to termination of payments by reason of the second marriage. Sec. 9(b) of the Act provides that the payment to a surviving wife who remarries shall be 'two years compensation in one sum upon remarriage'. The decision of the deputy commissioner completely ignores this provision of the law. Despite the remarriage of the claimant, and the fact that she continues to this very date in her status as Mrs. Kelly, the award makes no provision for a lump sum two-year payment to her. The attention of the court is directed to the fact that Sec. 9(b) of the Act provides that payments to a surviving wife shall continue only 'during widowhood'. It is thus apparent that Congress intended the right to benefits to end upon remarriage. In this case, remarriage was seven years before the death of the decedent, and the period of widowhood had ended before it began".

Claimant's purported marriage to Kelly in 1938 was void *ab initio*. "It was good for no legal purpose". 35 American Jurisprudence, Section 148. It created no legal status. It was neither a marriage nor a "remarriage" within the meaning of Section 9(b) of the Longshoremen's Act (33 U.S.C.A. section 909 (b)) which provides that an award to the surviving wife shall be "during widowhood". To hold otherwise would be to arrive at the absurd conclusion that although claimant's ceremony with Kelly in 1938 was not a marriage which would deprive her of compensation under Section 2 (16) of the Longshoremen's Act as the widow of the deceased employee it was a "remarriage" which would bar her from compensation under Section 9(b) of the Longshoremen's Act which provides that compensation to the surviving wife shall continue "during widowhood"; as appellants aptly state "the widowhood had ended before it began". The words "widowhood" and "remarriage" as used in the Longshoremen's Act refer to a *legal status* and the ceremony in 1938 did not affect claimant's legal status as the widow of the deceased employee.

The case of *Williams v. Lawson*, 35 F. (2d) 346, cited by appellants does not support the contention that the deputy commissioner should have terminated claimant's compensation seven years before it began (see page 18 of appellants' brief). In the cited case the surviving wife contended that she was entitled to compensation under Section 9(b) upon the mere showing that she was the "surviving wife" of the deceased employee; the court however, stated that the direction

in the Act to pay compensation "during widowhood" and the fact that the word "widow" was defined in another section of the Act showed that the "surviving wife" must also come within said definition of "widow" to be entitled to compensation.

It might be added that if appellants have any evidence that claimant has "remarried" since the death of her husband they may apply to the deputy commissioner for a modification of the award "on the ground of a change in conditions" under Section 22 of the Longshoremen's Act (33 U.S.C.A. sec. 922) in which event the deputy commissioner has authority to "terminate, continue, reinstate, increase or decrease such compensation". This point, however, was not raised before the deputy commissioner nor in the court below and hence is not properly before this court. *Parker, deputy commissioner v. Motor Boat Sales, Inc.*, 314 U. S. 244; *Helvering v. Tex-Penn Co.*, 300 U. S. 481, 498 (1937); *Ex parte Keiyo Kamiyama*, 44 F. (2d) 503, 505 (C.C.A. 9, 1930); *Hecht v. Alfaro*, 10 F. (2d) 464, 466 (C.C.A. 9, 1926); *Kortz v. Guardian Life Insurance Co. of America*, 144 F. (2d) 676, 679 (C.C.A. 10, 1944); *Goldie v. Cox*, 130 F. (2d) 695, 715 (C.C.A. 8, 1942); *Reconstruction Finance Corp. v. Sun Lumber Co.*, 126 F. (2d) 731, 738 (C.C.A. 4, 1942); *Ramming Real Estate Co. v. United States*, 122 F. (2d) 892, 893 (C.C.A. 8, 1941); *Atlantic Brewing Co., Inc. v. Wm. J. Brennan Grocery Co.*, 79 F. (2d) 45, 47 (C.C.A. 8, 1935).

CONCLUSION.

In view of the above it would seem that the finding of the deputy commissioner to the effect that claimant is the widow of the deceased employee "has warrant in the record" and that the compensation order has "a reasonable basis in law". *N.L. R. B. v. Hearst, Inc.*, 322 U. S. 111, 131. The order of the court below sustaining the compensation order was correct and should be affirmed.

Dated, April 5, 1948.

FRANK J. HENNESSY,

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Bureau of Employees' Compensation

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Assistant Chief Counsel

Of Counsel.

No. 11820

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

TAVARES CONSTRUCTION COMPANY, INC., a
corporation, CONCRETE SHIP CONSTRUCTORS,
a joint venture, STROUD-SEABROOK, a copartner-
ship, LLOYD S. STROUD, R. S. SEABROOK,
C. M. ELLIOTT, CARLOS TAVARES, HENRY
M. PAGE and DON F. GATES,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

see vol. 7511

TRANSCRIPT OF RECORD

(In Four Volumes)

VOLUME I

(Pages 1 to 372, Inclusive)

Upon Appeal From the District Court of the United States
for the Southern District of California
Southern Division

FILED

MAR 12 1948

PAUL P. O'BRIEN, CLERK

No. 11820

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

TAVARES CONSTRUCTION COMPANY, INC., a
corporation, CONCRETE SHIP CONSTRUCTORS,
a joint venture, STROUD-SEABROOK, a copartner-
ship, LLOYD S. STROUD, R. S. SEABROOK,
C. M. ELLIOTT, CARLOS TAVARES, HENRY
M. PAGE and DON F. GATES,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

TRANSCRIPT OF RECORD

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(Pages 1 to 372, Inclusive)

Upon Appeal From the District Court of the United States
for the Southern District of California
Southern Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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*Page number appearing at foot of Certified Transcript.

In the District Court of the United States in and for the
Southern District of California
Southern Division

No. 248 Civil

UNITED STATES OF AMERICA,

Plaintiff,

v.

CERTAIN PARCELS OF LAND IN THE CITY OF
NATIONAL CITY, COUNTY OF SAN DIEGO,
STATE OF CALIFORNIA; TAVARES CON-
STRUCTION COMPANY, INC., a corporation;
THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, a corporation; SAN FRAN-
CISCO BRIDGE COMPANY, a corporation; LEON-
ARD McLAUHLIN, Individually, and doing busi-
ness under the name and style of McLAUHLIN
WATER TAXI COMPANY; CARL A. JOHNSON;
PEARL JOHNSON; SANTA FE LAND IM-
PROVEMENT COMPANY, a corporation; SAN
DIEGO AND ARIZONA EASTERN RAILWAY
COMPANY, a corporation; DEFENSE PLANT
CORPORATION, an Agency of the United States of
America; CITY OF NATIONAL CITY, a municipal
corporation; COUNTY OF SAN DIEGO, a body
politic and corporate; STATE OF CALIFORNIA, a
corporation sovereign; DOE ONE to DOE FIVE
HUNDRED, inclusive; ONE DOE CORPORATION,
a corporation, to TWENTY-FIVE DOE CORPORA-
TION, a corporation, inclusive; A DOE to Z DOE,
inclusive, each as the Administrator of the Estate or
Executor of the Will of One Doe, Deceased, to Twenty-

six Doe, Deceased, inclusive, respectively; DOE ONE COMPANY, a copartnership, to DOE TWENTY-FIVE COMPANY, a copartnership, inclusive; and all persons, firms, corporations, and all other public and private legal entities of whatever nature, having or claiming to have any right, title, interest, or estate in or lien, encumbrance, servitude, easement, charge, demand, claim, or covenant on or in respect to the hereinafter described premises,

Defendants.

COMPLAINT IN CONDEMNATION

Complaint Amended: 1st date: Sep. 23, 1944;
2nd date: Jan. 15, 1945 [2]

To the Honorable, the United States District Court:

Comes now the plaintiff, United States of America, by Leo V. Silverstein, United States Attorney for the Southern District of California, by C. H. Scharnikow, Special Attorney, Lands Division, Department of Justice, as its attorneys, on application of the duly authorized officer of the United States, hereinafter referred to as the "Requesting Officer," and under the direction and by authority of the Attorney General of the United States, and for cause of action against the above-named defendants, and each of them, complains and alleges:

I.

That the plaintiff, United States of America, is entitled to acquire by the exercise of its power of eminent domain, pursuant to the statutes hereinafter set forth, the property hereinafter described for the uses and purposes hereinafter set forth.

II.

That in accordance with the provisions of said statutes, said requesting officer for and in behalf of the United States has designated and determined that the property hereinafter described is suitable and necessary for the purposes of the United States, and has selected such property for acquisition by the United States in these proceedings, and said selection, designation, and determination ever since have been and now are in full force and effect; that the purposes for which the plaintiff is taking said property as hereinafter alleged are necessary and constitute a public use, which use is authorized by law; that the acquisition thereof by plaintiff is, and will be, of greatest public benefit and to the least private injury; that plaintiff is informed and believes, and upon such information and belief alleges, that no part of said property has heretofore been appropriated to any public use, and if any part or portion thereof has heretofore been appropriated to a public use, the use to which said property is herein sought to be condemned and appropriated is a more necessary and paramount public use. [3]

III.

That plaintiff is informed and believes, and upon such information and belief alleges, that each parcel of property hereinafter described constitutes a whole parcel and not a part thereof, except where otherwise designated herein.

IV.

That plaintiff has named herein by their true names, or by fictitious names, all defendants known or believed

by it to have some interest in said property; that there may be other persons having some interests therein whom the plaintiff hereby identifies as unknown persons, and makes such unknown persons defendants herein to the end that title to said property may be vested in the United States of America to the extent hereinafter prayed for.

V.

That the defendants Doe One to Doe Five Hundred, inclusive, defendants One Doe Corporation to Twenty-five Doe Corporation, inclusive, defendants Doe One Company to Doe Twenty-five Company, inclusive, and defendants A Doe to Z Doe, inclusive, each as Administrator of the Estate or Executor of the Will of One Doe, Deceased, to Twenty-six Doe, Deceased, inclusive, respectively, and said One Doe, Deceased, to Twenty-six Doe, Deceased, inclusive, are and each is sued or named herein under the fictitious names above set out for the reason that plaintiff is ignorant of the true names of said defendants or decedents; that when the true names of said defendants or decedents, or any of them, are discovered, plaintiff will amend accordingly the pleadings or proceedings herein.

That One Doe Corporation to Twenty-five Doe Corporation, inclusive, is each a corporation, organized and existing under the laws of one of the states of the United States; that Doe One Company, to Doe Twenty-five Company, inclusive, is each a copartnership duly organized and existing, and is each composed of two or more copartners; that A Doe to Z Doe, inclusive, is each the duly appointed, qualified and acting Administrator of the Estate or Executor of the Will of One Doe, Deceased, to Twenty-six Doe, Deceased, inclusive, respectively. [4]

VI.

That this action is brought by the plaintiff under the authority of and pursuant to the provisions of the Act of Congress approved August 25, 1941 (Public Law No. 247—77th Congress), the Act of Congress approved March 5, 1942 (Public Law No. 474—77th Congress), the Act of Congress approved August 1, 1888 (25 Stat. 357, Title 40 U. S. C. Section 257), the Act of Congress approved March 27, 1942 (Public Law 507—77th Congress), being the Second War Powers Act of 1942, and acts amendatory thereof and supplementary thereto; that the "Requesting Officer" hereinbefore referred to is the Chairman of the United States Maritime Commission of the United States of America; that the purpose for which said lands are being acquired is the construction of facilities by the United States for the construction and repair of ships and the operation of such facilities for war purposes.

VII.

That the lands sought to be condemned herein are particularly described as follows: [5]

Those Certain Parcels of Land in the City of National City, County of San Diego, State of California, More Particularly Described as Follows:

Parcel 1. That portion of the tidelands of the City of National City, California, leased by the Tavares Construction Co., Inc., (and assigned to the Defense Plant Corporation) from the City of National City, under lease dated January 1, 1942, described as follows: Beginning at a point in the U. S. Bulkhead Line, said point being situate 409.09 feet E 6° 35' 32" E of the U. S. Station No. 302 in said bulkhead line, in the City of

National City, California; N 83° 24' 28" E 1379.87 feet to a point, thence S 10° 02' 45" W 655.58 feet to a point, thence S 83° 24' 28" W 987.17 feet to a point, thence N 6° 35' 32" W 76.00 feet to a point, thence S 63° 03' 59" W 218.63 feet to a point, thence N 6° 35' 32" W 628.14 feet to the point of beginning, an area of 18.37 acres, more or less.

Parcel 2. That portion of the tidelands of the City of National City, California, leased by the Tavares Construction Co., Inc., from the City of National City, under lease dated August 17, 1942, described as follows: Beginning at a point which is situate 1037.23 feet S 6° 35' 32" E and 205.00 feet N 83° 24' 28" E from U. S. Station No. 302 in the U. S. Bulkhead Line, National City, California, thence N 83° 24' 28" E 987.17 feet to a point, thence S 10° 02' 45" W 208.74 feet to a point, thence S 83° 24' 28" W 927.40 feet to a point, thence N 6° 35' 32" W 200.00 feet to the point of beginning, an area of 4.40 acres, more or less.

Parcel 3. That portion of the tidelands of the City of National City, California, owned by the City of National City and totally unencumbered, described as follows: Beginning at a point in the U. S. Bulkhead Line of the San Diego Bay, distant S 6° 35' 32" E 2210.39 feet from bulkhead point No. 302, thence S 63° 03' 59" W 1066.51 feet to a point in the U. S. Pierhead Line, thence N 6° 35' 32" W along said pierhead line [6] 639.91 feet, thence N 63° 03' 59" E 287.98 feet to a point, thence S 6° 35' 32" E 186.64 feet to a point, thence N 63° 03' 59" E 997.16 feet to a point, thence N 6° 35' 32" W 443.89 feet to a point, thence N 83° 24' 28" E 927.40 feet to a point, thence N 10° 02' 45" E 864.32 feet to a

point, thence N 83° 24' 28" E 104.58 feet, more or less, to a point in the Mean High Tide Line (as established by George D-Hemecourt, but not adopted by the Board of State Harbor Commissioners), said point being distant S 10° 04' 15" W. 32.42 feet from point No. 40 in said mean high tide line, thence S 10° 04' 15" W along said mean high tide line 557.46 feet to point No. 41 in said mean high tide line, thence S 12° 24' 15" W along said mean high tide line 453.80 feet to point No. 42 in said mean high tide line, thence S 18° 39' 00" W along said mean high tide line 220.14 feet to point No. 43 in said mean high tide line, thence S 9° 35' 58" W 28.50 feet to a point in said mean high tide line, thence S 72° 11' 58" W 194.91 feet to a point, thence S 88° 45' 32" W 156.35 feet to a point, thence N 83° 47' 28" W 495.00 feet to a point, thence S 6° 12' 32" W. 38.00 feet to a point, thence S 83° 47' 28" E 675.00 feet to a point, thence S 73° 27' 46" E 145.73 feet, more or less, to a point in said mean high tide line, thence S 9° 35' 58" W 83.19 feet to point No. 44 in said mean high tide line, thence S 4° 50' 02" E 303.57 feet to point No. 45 in said mean high tide line, thence S 0° 27' 32" E 71.26 feet to a point in said mean high tide line, thence S 83° 24' 28" W 989.19 feet to the point of beginning, all of which contains an area of 34.02 acres, more or less.

Parcel 4. That portion of the California Southern Railway Terminal Grounds, National City, California, County of San Diego, as shown on Map of National City, California, recorded by the County Recorder of San Diego County, October 1882, and owned by the Atchison, Topeka & Santa Fe Railway Co., described as follows: Beginning at a point in the Mean High Tide Line, said point being distant S 10° 04' 15" W 282.46 feet

from point No. 40 in [7] said mean high tide line, thence S $10^{\circ} 04' 15''$ W along said mean high tide line 307.42 feet to point No. 41 in said mean high tide line, thence S $12^{\circ} 24' 15''$ W along said mean high tide line 453.80 feet to point No. 42 in said mean high tide line, thence S $18^{\circ} 39' 00''$ W along said mean high tide line 220.14 feet to point No. 43 in said mean high tide line, thence S $9^{\circ} 35' 58''$ W 164.00 feet to a point in said mean high tide line, thence S $75^{\circ} 41' 00''$ E 52.00 feet, more or less, to a point in the northerly line of Bay Avenue, thence S $47^{\circ} 17' 32''$ E 124.00 feet to a point in the easterly line of Bay Avenue, thence N $1^{\circ} 43' 28''$ E 520.00 feet to a point, thence N $6^{\circ} 25' 00''$ E 241.19 feet to a point, thence N $10^{\circ} 04' 15''$ E 500.00 feet to a point in the center line of 14th Street, thence S $71^{\circ} 46' 30''$ W along said center line of said 14th Street 11.36 feet to the point of beginning, all of which contains an area of 1.36 acres, more or less.

Parcel 5. That portion of the tidelands of the City of National City California, leased by the Atchison, Topeka & Santa Fe Railway Co. from the City of National City, under lease dated March 21, 1921, described as follows: Beginning at a point in the Mean High Tide Line of San Diego Bay (as established by George D-Hemecourt, but not adopted by the Board of State Harbor Commissioners), said point being distant S $9^{\circ} 35' 58''$ W 28.50 feet from point No. 43 in said mean high tide line, thence S $72^{\circ} 11' 58''$ W 194.91 feet to a point, thence S. $88^{\circ} 45' 32''$ W 156.35 feet to a point, thence N $83^{\circ} 47' 28''$ W 495.00 feet to a point, thence S $6^{\circ} 12' 32''$ W 38.00 feet to a point, thence S $83^{\circ} 47' 28''$ E 675.00 feet to a point, thence S $73^{\circ} 27' 46''$ E 145.73 feet, more or less, to a point in said mean high tide line, thence along

said mean high tide line N 9° 35' 58" E 164.00 feet to the point of beginning, an area of 1.03 acres, more or less.

Parcel 6. That portion of the California Southern Railway Terminal Grounds as shown on map of National City, California, recorded October, 1882, and condemned for Bay Avenue by the City of National City, September 26, 1902, [8] described as follows: Beginning at a point in the easterly line of Bay Avenue, said point being distant N 0° 16' 32" W 234.62 feet from the southeasterly corner of 19th Street and Bay Avenue, thence N 0° 16' 32" W along said southeasterly line of Bay Avenue 111.59 feet to a point, thence N 1° 43' 28" E along said southeasterly line of Bay Avenue 227.00 feet to a point, thence N 47° 17' 32" W 124.00 feet along the northerly line of said Bay Avenue to a point, thence N 75° 41' 0" W 52.00 feet, more or less, to a point in the Mean High Tide Line of San Diego Bay (as established by George d-Hemecourt, but not adopted by the Board of State Harbor Commissioners), said point being distant S 9° 35' 58" W 192.50 feet from point No. 43 in said mean high tide line, thence S 9° 35' 58" W along said mean high tide line 83.19 feet to point No. 44 in said mean high tide line, thence S 4° 50' 02" E along said mean high tide line 303.57 feet to point No. 45 in said mean high tide line, thence S 0° 27' 32" E along said mean high tide line 71.26 feet to a point, thence N 83° 24' 28" E 116.69 feet to the point of beginning, an area of 1.23 acres, more or less.

Parcel 7. That portion of the tidelands of the City of National City, California, leased by the San Francisco Bridge Co. from the City of National City, under lease dated January 1, 1941, described as follows: Beginning

at a point in the U. S. Bulkhead Line of San Diego Bay, said point being distant S $6^{\circ} 35' 32''$ E. 1037.23 feet from bulkhead point No. 302, thence N $63^{\circ} 03' 59''$ E 218.64 feet to a point, thence S $6^{\circ} 35' 32''$ E 719.89 feet to a point, thence S $63^{\circ} 03' 59''$ W 933.17 feet to a point, thence N $6^{\circ} 35' 32''$ W 186.64 feet to a point, thence N $63^{\circ} 03' 59''$ E 714.54 feet to a point, thence N $6^{\circ} 35' 32''$ W 533.25 feet to the point of beginning, an area of 6.26 acres, more or less.

Parcel 8. That portion of the tidelands of the City of National City, California, leased by Leonard McLaughlin from the City of National City, under lease dated December 2, 1941, described as follows: Beginning at a point in the U. S. Bulkhead Line of San Diego Bay, said point being distant S $6^{\circ} 35' 32''$ E 1570.48 feet from bulkhead point No. 302, thence S $63^{\circ} 03' 59''$ W 714.54 feet to the true point of beginning of this description, thence continuing S $63^{\circ} 03' 59''$ W 63.99 feet to a point, thence S $6^{\circ} 35' 32''$ E 186.64 feet to a point, thence N $63^{\circ} 03' 59''$ E 63.99 feet to a point, thence N $6^{\circ} 35' 32''$ W 186.84 feet to the true point of beginning, an area of 0.26 acres, more or less.

Parcel 9. That portion of Block 271, National City, California, County of San Diego, as shown on the Map of National City, California, recorded by the County Recorder of San Diego County, October 1882, leased by the Tavares Construction Co., Inc., from Carl A. Johnson and Pearl Johnson under lease dated June 5, 1942, described as follows: Beginning at the intersection of the center line of 14th Street (80 feet wide) (vacated) and the westerly line of Cleveland Avenue (100 feet wide); thence along said center line of 14th Street (va-

cated) S 71° 46' 30" W 250.00 feet more or less, to the intersection of the easterly line of Harrison Avenue (40 feet wide), thence along said easterly line S 18° 13' 30" E 165.00 feet to a point, thence N 71° 46' 30" E 135.00 feet to a point, thence S 18° 13' 30" E 125.00 feet more or less to the northerly line of 15th Street (80 feet wide), thence along said northerly line N 71° 46' 30" E 25.00 feet to a point, thence N 18° 13' 30" W 125.00 feet to a point, thence N 71° 46' 30" E 90.00 feet more or less to the westerly line of Cleveland Avenue, thence along said westerly line N 18° 13' 30" W 165.00 feet to the point of beginning, an area of 1.02 acres, more or less.

Parcel 10. That portion of Block 270, National City, California, County of San Diego, as shown on the Map of National City, California, recorded by the County Recorder of San Diego County, October 1882, owned by the Atchison, Topeka & Santa Fe Improvement Co., and leased to the Tavares Construction Co., Inc., under lease dated August 4, 1942, described as follows: Beginning at the southwesterly corner of 13th Street (80 feet [10] wide) and Cleveland Avenue (100 feet wide), thence S 71° 46' 30" W 142.59 feet along the southerly line of said 13th Street to a point, said point being distant S 71° 46' 30" W 7.59 feet from the westerly line of a vacated alley (20 feet wide), thence S 3° 27' 45" E 258.74 feet more or less to a point in the northerly line of 14th Street (80 feet wide) (vacated), thence S 18° 13' 30" E 40.00 feet to the center line of said vacated 14th Street, thence along said center line N 71° 46' 30" E 208.52 feet more or less to the westerly line of said Cleveland Avenue, thence along said westerly line of

Cleveland Avenue N $18^{\circ} 13' 30''$ W 290.20 feet to the point of beginning, an area of 1.20 acres, more or less.

Parcel 11. That portion of Block 270, National City, California, County of San Diego, as shown on the Map of National City, California, recorded by the County Recorder of San Diego County, October 1882, leased from the San Diego and Arizona Eastern Railway, Inc., by the Tavares Construction Co., Inc., under lease dated September 16, 1942, described as follows: Beginning at a point in the southerly line of 13th Street (80 feet wide), said point being distant S $71^{\circ} 46' 30''$ W 7.59 feet from the westerly line of a vacated alley (20 feet wide), thence S $3^{\circ} 27' 45''$ E 258.74 feet, more or less, to a point in the northerly line of 14th Street (80 feet wide) (vacated), said point being distant S $71^{\circ} 46' 30''$ W 73.52 feet from the westerly line of said vacated alley (20 feet wide), thence S $18^{\circ} 13' 30''$ E 40.00 feet to the center line of 14th Street (80 feet wide) (vacated), thence S $71^{\circ} 46' 30''$ W along said center line 41.48 feet to a point, thence N $18^{\circ} 13' 30''$ W 40.00 feet to a point in the northerly line of said 14th Street (vacated), thence N $71^{\circ} 46' 30''$ W 0.08 feet along the northerly line of 14th Street, thence N $3^{\circ} 27' 45''$ W 150.43 feet to a point, thence N $5^{\circ} 52' 50''$ E 114.73 feet to a point in the southerly line of 13th Street (80 feet wide), thence along said southerly line of 13th Street N $71^{\circ} 46' 30''$ [11] E 22.14 feet to the point of beginning, an area of 0.05 acres, more or less. [12]

VIII.

That the estate or interest in said lands hereinbefore described which plaintiff intends and seeks to take, acquire, condemn, hold, and own by this proceeding is the

fee simple title thereto, with the right of immediate possession thereof for the purpose of occupying, using and improving the same pursuant to the authority of the Second War Powers Act.

IX.

That under the provisions of the Second War Powers Act approved March 27, 1942 (Public Law 507, 77th Congress), it is provided in part as follows:

“Upon or after the filing of the Condemnation Petition immediate possession may be taken and the property may be occupied, used, and improved for the purposes of the Act, notwithstanding any other law”;

That plaintiff, United States of America, is now in a state of war, and immediate possession of the real property hereinbefore described is necessary.

X.

That the apparent and presumptive owners of the lands hereinbefore described are the defendants Tavares Construction Company, Inc., a corporation; The Atchison, Topeka and Santa Fe Railway Company, a corporation; San Francisco Bridge Company, a corporation; Leonard McLauchlin, Individually, and doing business under the name and style of McLauchlin Water Taxi Company; Carl A. Johnson; Pearl Johnson; Santa Fe Land Improvement Company, a corporation; San Diego and Arizona Eastern Railway Company, a corporation; Defense Plant Corporation, an Agency of the United States of America; that the defendants, City of National City, a municipal corporation; County of San Diego, a body politic and corporate; State of California, a corporation sovereign; Doe One to Doe Five Hundred, inclusive, One

Doe Corporation, a corporation, to Twenty-five Doe Corporation, a corporation, inclusive; [13] A Doe to Z Doe, inclusive, each as the Administrator of the Estate or Executor of the Will of One Doe, Deceased, to Twenty-six Doe, Deceased, inclusive, respectively, Doe One Company, a copartnership, to Doe Twenty-five Company, a copartnership, inclusive, each claims some right, title, interest, or lien in, to, or upon the said real property hereinbefore described, or some part thereof, the exact nature of which such claim or claims is unknown to plaintiff.

XI.

That the defendant, City of National City, is a municipal corporation organized and existing under and by virtue of the laws of the State of California; that the defendant, County of San Diego, is a body politic and corporate, organized and existing under and by virtue of the laws of the State of California; that the defendant, State of California, is a corporation sovereign and one of the states composing the United States of America;

That the defendants, Tavares Construction Company, Inc., San Francisco Bridge Company, and Santa Fe Land Improvement Company, are, and each of said defendants is, a corporation organized and existing under and by virtue of the laws of the State of California;

That the defendant, The Atchison, Topeka and Santa Fe Railway Company, is a corporation organized and existing under and by virtue of the laws of the State of Kansas;

That the defendant, San Diego and Arizona Eastern Railway Company, is a corporation organized and exist-

ing under and by virtue of the laws of the State of Nevada;

That the defendant, Leonard McLauchlin, is an individual doing business under the fictitious firm name and style of McLauchlin Water Taxi Company;

That the defendant, Defense Plant Corporation, is a corporation organized and existing under and by virtue of the laws of the United States, and is an instrumental-ity or agency of the United States of America. [14]

Wherefore, plaintiff prays judgment:

1. That the Court ascertain and assess the value of the lands herein sought to be taken and condemned, and each and every separate estate or interest therein;

2. Adjudging that the public use for which plaintiff takes and condemns said lands is a necessary public use of the plaintiff and that the use to which said lands are being applied is a use authorized by law and that all of said lands are necessary thereto;

3. Vesting in the United States of America the fee simple title to the lands hereinbefore described, to be utilized for construction of facilities by the United States for the construction and repair of ships and the operation of such facilities for war purposes, and for such other uses as may be authorized by Congress or by Executive Order, and that the said lands shall be deemed to be condemned and taken for the use of the United States of America for the uses and purposes hereinbefore set forth; and

Further adjudging that the right to just compensation for the taking of said lands hereinbefore described be vested in the persons entitled thereto as their respective

interests may appear and be established and adjudged herein;

4. That all liens or encumbrances of record against the property herein sought to be taken and condemned be satisfied out of the award to be made in this proceeding;

5. That an order be made for the delivery of immediate possession of said lands to the United States of America pursuant to the provisions of the Acts of Congress hereinbefore set forth, and that an order be made for the notice to be given of such order for possession; [15]

6. For such other and further relief as the Court deems meet and proper in the premises and as the nature of the case may require.

Dated: This 10th day of November, 1942.

LEO V. SILVERSTEIN

United States Attorney

C. H. SCHARNIKOW

Special Attorney

Lands Division

Department of Justice

By C. H. Scharnikow

Attorneys for Plaintiff

[Endorsed]: Filed Nov. 10, 1942. Edmund L. Smith,
Clerk. [16]

[Title of District Court and Cause]

AFFIDAVIT IN SUPPORT OF ORDER FOR POSSESSION UNDER SECOND WAR POWERS ACT

State of California

County of San Diego—ss.

Neil J. Allinger, being first duly sworn, deposes and says:

That he is the Resident Plant Engineer of the United States Maritime Commission, in charge of construction of facilities for shipbuilding purposes, upon the lands involved in the within action, and makes this affidavit in such capacity;

That affiant has personally viewed and examined, and is familiar with, the lands described in plaintiff's Complaint and described therein as Parcels 1 to 11 inclusive;

That the lands described as Parcels 1 and 2 are leased by the City of National City to the Tavares Construction Company, Inc., and are occupied by the said Tavares Construction Company, Inc. for shipbuilding purposes; that Parcels 9, 10, and 11 are leased by Carl A. Johnson and [17] Pearl Johnson, by the Santa Fe Land Improvement Company, and by the San Diego and Arizona Eastern Railway Company, respectively, to Tavares Construction Company, Inc., and are occupied and used by the said Tavares Construction Company, Inc. for shipbuilding purposes;

That the title to the real property designated as Parcel 3 is vested in the City of National City, and Parcel 6 consists of a portion of a vacated street formerly known

as Bay Avenue; that the said Parcel 3 is being used and occupied by Tavares Construction Company, Inc., and Parcel 6 is used and occupied by the said Tavares Construction Company, Inc., and the defendant The Atchison, Topeka, and Santa Fe Railway Company; that there are no improvements located upon the said Parcel 3 and 6 or either of them.

That the property designated as Parcel 7 is leased from the City of National City to the defendant San Francisco Bridge Company, and is being used and occupied by the Tavares Construction Company, Inc., with the permission of said San Francisco Bridge Company, and is also being used to some extent by the said San Francisco Bridge Company for the purpose of storage of materials thereon, said parcel being improved only with a shack and pier; that Parcel 8 is leased by the City of National City to the defendant Leonard McLauchlin, doing business as McLauchlin Water Taxi Company, but the said Parcel 8 is unimproved and is unoccupied by the said Leonard McLauchlin or by any person other than Tavares Construction Company, Inc.;

That Parcel 4 is owned and occupied by the defendant, The Atchison, Topeka and Santa Fe Railway Company, and Parcel 5 is leased by the said The Atchison, Topeka and Santa Fe Railway Company from the City of National City, and is occupied by said defendant railway company; that there are located upon said Parcels 4 and 5 railroad tracks used by the said railway company in connection with a certain Wye, or turn-around track; that there are no dwellings or other structures upon any of the said real property except the said railroad tracks upon Parcels 4 and 5, a shack on Parcel 9, [18] and

the shack and pier upon Parcel 7, which is used as a tool shed by a storage yard attendant;

That the possession of the said real property which is herein prayed is requested for the use of Tavares Construction Company, Inc. in furtherance of shipbuilding construction and activities of said Tavares Construction Company, Inc. and the United States Maritime Commission; that immediate possession of the real property designated as Parcels 1, 2, 3, 6, 7, 8, 9, 10, and 11, which said parcels are occupied by the said Tavares Construction Company, Inc., either by lease from the City of National City or other persons, or by the permission and consent of the owners or lessees thereof, is necessary and imperative; that the use to be made by plaintiff and the said Tavares Construction Company, Inc. of Parcels 4 and 5 will require the removal and relocation of the railroad tracks hereinbefore referred to, and plaintiff prays for an order of this Court for the possession of the said Parcels 4 and 5 upon the expiration of thirty (30) days from the making of an order by this Court for the possession thereof.

NEIL J. ALLINGER

Subscribed and sworn to before me this 10th day of November, 1942.

(Seal)

WM. J. ADAMS

Notary Public in and for the County of San Diego,
State of California

My Commission Expires Feb. 21, 1944.

[Endorsed]: Filed Nov. 10, 1942. Edmund L. Smith,
Clerk. [19]

[Title of District Court and Cause]

ORDER FOR POSSESSION UNDER SECOND
WAR POWERS ACT

Upon reading and filing the Complaint in Condemnation in the within action and the Affidavit of Neil J. Allinger, and upon application of Leo V. Silverstein, United States Attorney for the Southern District of California, and C. H. Scharnikow and Wm. J. Adams, Special Attorneys, Lands Division, Department of Justice, attorneys for plaintiff, for an order for possession of the property described in said Complaint, pursuant to the Second War Powers Act of 1942 approved March 27, 1942 (Public Law 507, 77th Congress), and good cause appearing therefor,

It is Hereby Ordered, Adjudged, and Decreed that plaintiff, United States of America, be and it hereby is granted immediate possession of all of the lands described in plaintiff's Complaint herein as Parcels 1, 2, 3, 6, 7, 8, 9, 10, and 11, with the right to occupy, use, and improve the same pursuant to the authority of the Second War Powers Act; and it is further ordered that plaintiff be, and it hereby is, granted [20] the possession of the real property described in said Complaint as Parcels 4 and 5 upon the expiration of thirty (30) days from the date of this Order, with the right at said time to use, occupy, and improve the said Parcels 4 and 5.

It Is Further Ordered that notice of the making and filing of this Order be given to the defendants, City of

National City, Carl A. Johnson and Pearl Johnson, Santa Fe Land Improvement Company, San Diego and Arizona Eastern Railway Company, San Francisco Bridge Company, Leonard McLauchlin, and The Atchison, Topeka, and Santa Fe Railway Company, either by personal service of the same upon the said defendants, or by mailing, addressed to said defendants at their post office, business, or residence addresses.

The real property herein referred to is more particularly described upon the sheets herein annexed marked "Exhibit A" and made a part hereof, to which reference is hereby made.

Dated: This 10th day of November, 1942, at 4:30 o'clock P. M.

JEREMIAH NETERER

United States District Judge

Presented by:

LEO V. SILVERSTEIN

United States Attorney

C. H. SCHARNIKOW

WM. J. ADAMS

Special Attorneys

Lands Division, Department of Justice

By C. H. Scharnikow

Attorneys for Plaintiff [21]

EXHIBIT "A"

Those Certain Parcels of Land in the City of National City, County of San Diego, State of California, More Particularly Described as Follows:

Parcel 1. [Description not printed as it is same as set forth in Complaint on page 6.]

Parcel 2. [Description not printed as it is same as set forth in Complaint on page 7.]

Parcel 3. [Description not printed as it is same as set forth in Complaint on page 7.] [22]

Parcel 4. [Description not printed as it is same as set forth in Complaint on page 8.] [23]

Parcel 5. [Description not printed as it is same as set forth in Complaint on page 9.]

Parcel 6. [Description not printed as it is same as set forth in Complaint on page 10.] [24]

Parcel 7. [Description not printed as it is same as set forth in Complaint on page 10.]

Parcel 8. [Description not printed as it is same as set forth in Complaint on page 11.] [25]

Parcel 9. [Description not printed as it is same as set forth in Complaint on page 11.]

Parcel 10. [Description not printed as it is same as set forth in Complaint at page 12.] [26]

Parcel 11. [Description not printed as it is same as set forth in Complaint on page 13.] [27]

[Endorsed]: Filed Nov. 10, 1942. Edmund L. Smith, Clerk. [28]

[Title of District Court and Cause]

AMENDMENT TO COMPLAINT IN CONDEMNATION

Comes now the plaintiff, United States of America, by Eugene D. Williams, Special Assistant to the Attorney General, and Wm. J. Adams, Special Attorney, Lands Division, Department of Justice, and as and for an amendment to VII of plaintiff's Complaint in Condemnation herein, alleges:

I.

That since the filing of plaintiff's Complaint in Condemnation herein, E. S. Land, Chairman of the United States Maritime Commission of the United States of America, referred to in said Complaint as the "Requesting Officer", has requested that said Complaint be amended for the purpose of acquiring an additional 30.92 acres of land adjacent to and contiguous with the lands described in said Complaint.

The said additional parcel of land is described as follows:

PARCEL "A"

That portion of the tidelands lying between the U. S. Bulkhead Line and Pierhead Line of San Diego Bay, [31] National City, County of San Diego, California, described as follows:

Beginning at a point in the U. S. Bulkhead Line of San Diego Bay, said point being distant S 6° 35' 32" E 409.09 feet from bulkhead point #302; thence S 6° 35' 32" E along said bulkhead line 1161.39 feet to a point; thence S 63° 03' 59" W 1066.51 feet to

a point in the U. S. Pierhead Line; thence N 6° 35' 32" W along said pierhead line 1532.13 feet; thence N 83° 24' 28" E 1000.00 feet to the point of beginning, containing an area of 30.92 acres, more or less.

II.

That the estate or interest in the land hereinbefore described which plaintiff by this action intends to take, acquire, condemn, hold and own is the fee simple title thereto.

III.

That the additional taking provided herein is brought by the plaintiff under the authority of and pursuant to the provisions of the Act of Congress approved August 1, 1888 (25 Stat. 357, Title 40, U. S. C. Section 257); the Act of Congress approved March 27, 1942 (Public Law 507, 77th Congress); the Act of Congress known and described as Public Law 247, 77th Congress, approved August 25, 1941; the Act of Congress approved March 5, 1942 (Public Law 474, 77th Congress); the Merchant Marine Act of 1936, as amended, and any Acts supplementary thereto and amendatory thereof; that the purpose for which the lands hereinbefore described is taken is for the construction and repair of ships for war purposes.

IV.

That this Amendment to Complaint in Condemnation is filed under the provisions of the Second War Powers Act of 1942, approved March 27, [32] 1942 (Public Law 507, 77th Congress) which provides in part as follows:

“Upon or after the filing of the condemnation petition, immediate possession may be taken and the

property may be occupied, used, and improved for the purposes of the Act, notwithstanding any other law"; that a state of war exists, and immediate possession of said land is necessary.

V.

That the apparent and presumptive owners of the land hereinbefore described are the City of National City, a municipal corporation, and the State of California, a corporation sovereign.

VI.

That the defendant City of National City is a municipal corporation organized and existing under and by virtue of the laws of the State of California;

That the defendant State of California is a corporation sovereign.

Wherefore, plaintiff prays that the fee simple title to the lands hereinbefore described be declared to be vested in the United States of America, and for the relief prayed for in plaintiff's Complaint herein.

Dated: This 22d day of September, 1944.

EUGENE D. WILLIAMS

Special Assistant to the Attorney General

WM. J. ADAMS

Special Attorney Lands Division

Department of Justice

By Wm. J. Adams

Attorneys for Plaintiff

[Endorsed]: Filed Sep. 23, 1944. Edmund L. Smith,
Clerk. [33]

[Title of District Court and Cause]

ORDER FOR IMMEDIATE POSSESSION

Upon reading and filing the Amendment to Complaint in Condemnation in the within action, and the Affidavit of Wm. J. Adams, and upon application of Eugene D. Williams, Special Assistant to the Attorney General, and Wm. J. Adams, Special Attorney, Lands Division, Department of Justice, attorneys for plaintiff, for an order for the immediate possession of the property described in said Amendment to Complaint, pursuant to the Second War Powers Act approved March 27, 1942 (Public Law 507, 77th Congress), and good cause appearing therefor,

It Is Hereby Ordered, Adjudged and Decreed that plaintiff, United States of America, have immediate possession of all of the land particularly described in plaintiff's Amendment to Complaint [34] herein, designated as Parcel "A", and of the whole thereof.

Dated: This 23rd day of September, 1944, at 9:58 o'clock, A. M.

PAUL J. McCORMICK

United States District Judge

Presented by:

EUGENE D. WILLIAMS

Special Assistant to the Attorney General

WM. J. ADAMS

Special Attorney, Lands Division

Department of Justice

By Wm. J. Adams

Attorneys for Plaintiff

[Endorsed]: Filed Sep. 23, 1944. Edmund L. Smith,
Clerk. [35]

[Title of District Court and Cause]

DECLARATION OF TAKING NO. 1

To the Honorable

The United States District Court:

Whereas the land and improvements which constitute the subject matter of this Declaration and included in the above-entitled proceedings has heretofore been made available for public use by the United States of America by virtue of an order of this Honorable Court; and

Whereas the United States Maritime Commission has made a determination as to the estimated just compensation for the property hereinafter described and is therefore prepared to have title thereto vest absolutely and in fee simple in the United States of America upon the filing of this Declaration in said proceedings.

Now, Therefore, the United States of America and the United States Maritime Commission acting by and through E. S. Land, Chairman of the United States Maritime Commission under and by virtue of the provisions of Title II of the Second War Powers Act, 1942; Public Law No. 247, 77th Congress approved August 25, 1941; the Act of Congress known and described as Public Law No. 474, 77th Congress, approved March 5, 1942; the Merchant Marine Act, 1936, as amended, and the Act of Congress approved February 26, 1931 (46 Stat. 1421) do hereby make and cause to be filed this Declaration [36] of taking pursuant to said Acts of Congress and by vir-

tue and authority thereto do declare that the land described in Schedule "A", attached hereto and made a part hereof, and which is a part of the same land described in the petition filed in this proceedings, and the fee simple title thereto are hereby taken under the authority of said Acts of Congress, and that the public use for which said land is taken is for the construction of facilities to be used in the construction and repair of ships and the operation of such facilities, and the estate hereby taken in said land for the public use aforesaid is in fee simple absolute, excepting, however, all of the right, title and interest of the United States of America in and to said real estate, including the ownership of all improvements, fixtures and personalty located thereon or in any way appertaining thereto which have heretofore vested in the United States under and by virtue of the terms of any and all leases entered into by Tavares Construction Company, Inc., its successors or assigns, as lessee, to any and all of the land described in said Schedule "A", and under and by virtue of the terms of any and all contracts between the United States of America and the Tavares Construction Company, Inc., its successors or assigns, for the construction of facilities to be used in the construction and repair of ships and the operation of such facilities.

The United States Maritime Commission hereby states that the sum of money estimated by it as just compensation for the land and improvements thereon hereby taken is \$116,540.00. Said estimated just compensation is allocated as set forth in Schedule "B", attached hereto

and hereby made a part hereof. The United States Maritime Commission hereby deposits in the registry of this Honorable Court for the use of the persons entitled thereto, the amount of estimated compensation set forth in said Schedule "B", and is of the opinion that the ultimate award of damages for the taking of said property will be within the limits prescribed by Congress to be paid as a price therefor.

In Witness Whereof, the petitioner, United States of America has caused this Declaration to be signed in the name of the United States [37] Maritime Commission, the authority empowered by law to acquire the land described in the petition, by its Chairman, E. S. Land, thereunto duly authorized on this 28th day of Sept., 1944, in the City of Washington, District of Columbia.

UNITED STATES MARITIME COMMISSION

By E. S. Land

Chairman

Attest:

JOHN R. TANKARD

Acting Assistant Secretary [38]

SCHEDULE "A"

Those certain parcels of land in the City of National City, County of San Diego, State of California, more particularly described as follows:

Parcel No. 2. [Description not printed as it is same as set forth in Complaint on page 7.]

Parcel No. 3. [Description not printed as it is same as set forth in Complaint on page 7.] [39]

Parcel No. 4. [Description not printed as it is same as set forth in Complaint on page 8.] [40]

Parcel No. 5. [Description not printed as it is same as set forth in Complaint on page 9.]

Parcel No. 6. [Description not printed as it is same as set forth in Complaint on page 10.] [41]

Parcel No. 7. [Description not printed as it is same as set forth in Complaint on page 10.]

Parcel No. 8. [Description not printed as it is same as set forth in Complaint on page 11.] [42]

Parcel No. 9. [Description not printed as it is same as set forth in Complaint on page 11.]

Parcel No. 10. [Description not printed as it is same as set forth in Complaint on page 12.] [43]

Parcel No. 11. [Description not printed as it is same as set forth in Complaint on page 13.] [44]

PARCEL "A"

That portion of the tidelands lying between the U. S. Bulkhead Line and Pierhead Line of San Diego Bay, National City, County of San Diego, California, described as follows:

[Description not printed as it is same as set forth in Amendment to Complaint at page 24.] [45]

(Photostats)

SCHEDULE "B"

<u>Parcel Number</u>	<u>Ostensible Owner</u>	<u>Estimated Just Compensation</u>
2, 3, 5, 6, 7, 8 and A	City of National City	\$106,240.
4	Atchison, Topeka & Santa Fe Railway Company	6,000.
9	Carl A. Johnson & Pearl Johnson	2,100.
10	Santa Fe Land Improvement Company	1,900.
11	San Diego and Arizona Eastern Railway, Inc.	300.

[Endorsed]: Filed Oct. 3, 1944. Edmund L. Smith,
Clerk. [48]

VI. FUTURE

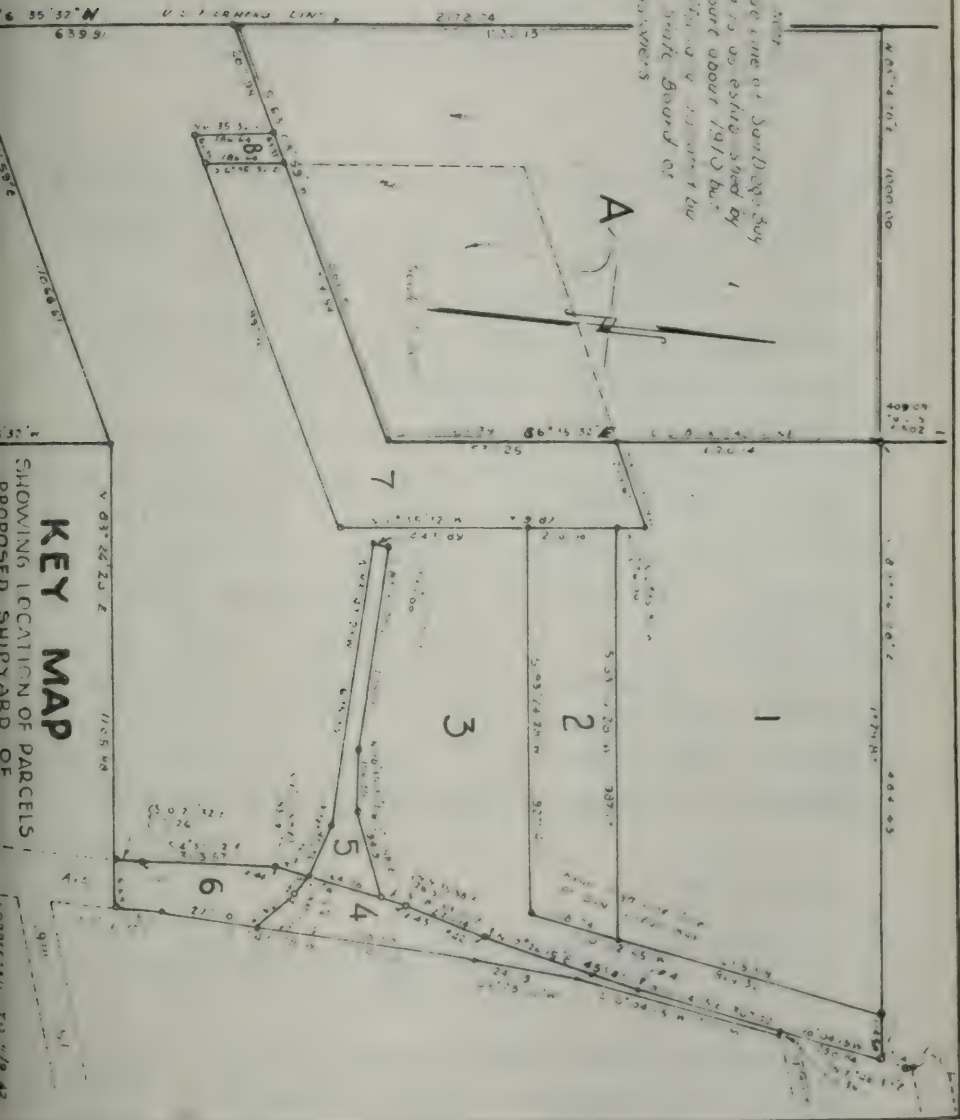


SEPTENNIO 1911

100

CHANNEL - SAN DIEGO BAY

The Aerial High Line of San Diego Bay
 as shown hereon is as established by
 George D. Hemmick about 1910 but
 has not been officially approved by
 the California State Board of
 Harbor Commissioners



KEY MAP

SHOWING LOCATION OF PARCELS
 PROPOSED SHIPYARD OF

In the District Court of the United States in and for the
Southern District of California

Southern Division

No. 248-SD Civil

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CERTAIN PARCELS OF LAND in the City of National City, County of San Diego, State of California; TAVARES CONSTRUCTION COMPANY, INC., a corporation; THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation; SAN FRANCISCO BRIDGE COMPANY, a corporation; LEONARD McLAUCHLIN, Individually, and doing business under the name and style of McLAUCHLIN WATER TAXI COMPANY; CARL A. JOHNSON; PEARL JOHNSON; SANTA FE LAND IMPROVEMENT COMPANY, a corporation; SAN DIEGO AND ARIZONA EASTERN RAILWAY COMPANY, a corporation; CITY OF NATIONAL CITY, a municipal corporation; COUNTY OF SAN DIEGO, a body politic and corporate; STATE OF CALIFORNIA, a corporation sovereign; et al.,

Defendants.

DECREE ON DECLARATION OF TAKING
NO. 1 [49]

Comes now the plaintiff, United States of America, by Eugene D. Williams, Special Assistant to the Attorney General of the United States of America, and Wm. J. Adams, Special Attorney, Lands Division, Department of

Justice, and moves the Court to enter a Decree on Declaration of Taking No. 1 filed in the above entitled action on October 3, 1944, and for an order ratifying, confirming and continuing in the United States of America the possession of the real property herein described, granted to plaintiff upon the filing of plaintiff's complaint herein, and upon consideration thereof and of the Complaint in Condemnation filed herein, said Declaration of Taking No. 1 and the statutes in such cases made and provided, the Court finds and decrees as follows:

First: That the United States of America is entitled to acquire property by eminent domain for the purposes as set out and prayed for in said complaint;

Second: That a complaint in condemnation was filed at the request of the United States Maritime Commission, acting by and through E. S. Land, Chairman of the United States Maritime Commission, the authority empowered by law to acquire the property described in said complaint, and also under the authority of the Attorney General of the United States;

Third: That said complaint in condemnation and Declaration of Taking No. 1 state the authority under which, and the public use for which, said property was taken; that the United States Maritime Commission is duly authorized and empowered by law to acquire property such as is described in the complaint, for the public use as provided for in the Acts of Congress hereinafter set forth, and that the Attorney General of the United States is the person authorized by law to direct the institution of such condemnation proceedings;

Fourth: That a proper description of the lands sought to be taken, sufficient for identification, is set out in said Declaration of Taking No. 1;

Fifth: That a statement of each estate or interest in said lands taken for said public use is set out in said Declaration of Taking No. 1; [50]

Sixth: That a plat or plan showing the lands taken is annexed to and incorporated in said Declaration of Taking No. 1;

Seventh: That a statement is contained in said Declaration of Taking No. 1 and set forth in Schedule "B" annexed thereto, of a sum of money estimated by said Acquiring Authority to be just compensation for the taking of said lands in the amount of One Hundred Sixteen Thousand, Five Hundred and Forty Dollars (\$116,540.00), and that said sum was deposited in the Registry of this court for the use of the persons entitled thereto, upon and at the time of the filing of said Declaration of Taking No. 1;

Eighth: That there is a statement in said Declaration of Taking No. 1 that the estimated ultimate award of compensation for the taking of said lands, in the opinion of the United States Maritime Commission, will be within the limits prescribed by Congress to be paid as a price therefor.

And the Court having fully considered said complaint in condemnation the Declaration of Taking No. 1 and the statutes in such cases made and provided, is of the opinion that the United States of America is entitled to take the property hereinafter described and to have the estate or interest hereinafter set forth vested in it pursuant to and in accordance with the Act of Congress ap-

proved February 26, 1931 (46 Stat. 1421, 40 U. S. C. Sec. 258a), and acts supplementary thereto and amendatory thereof, and under the further authority of the Act of Congress approved August 25, 1941 (Public Law 247—77th Congress), the Act of Congress approved March 5, 1942 (Public Law 474—77th Congress), the Merchant Marine Act of 1936, as amended, and the Act of Congress approved March 27, 1942 (Public Law 507—77th Congress).

It Is Therefore Ordered, Adjudged and Decreed that the fee simple title to the lands hereinafter described, excepting, however, all of the right, title, and interest of the United States of America in and to said real estate, including the ownership of all improvements, fixtures and personalty located thereon or in any way appertaining thereto which have heretofore vested in the United States of America under and by virtue of the terms of any and all leases entered into by Tavares Construction Company, Inc., a corporation, its successors [51] or assigns, for the construction of facilities to be used in the construction and repair of ships and the operation of such facilities, be and hereby is vested in the United States of America, and said lands are deemed to be condemned and taken, and are condemned and taken for the use of the United States of America, and the right to just compensation for the same is vested in the persons entitled thereto when said compensation shall be ascertained and awarded in this proceeding, and established by judgment thereunder, pursuant to law.

The lands so condemned and taken are particularly described upon the sheets hereto annexed marked Schedule "A" and by this reference made a part hereof.

It appearing that the plaintiff is in possession and occupancy of the lands herein condemned by virtue of said complaint in condemnation and amendment thereto, and the orders of this court dated November 10, 1942 and September 23, 1944, respectively, and on file herein,

It Is Further Ordered, Adjudged, and Decreed that the possession heretofore granted to plaintiff of the said real property, and the whole thereof, heretofore granted by said orders, be and the same is hereby ratified, confirmed, and continued.

Nothing herein is to be considered as a determination by the Court that the estimate of the United States Maritime Commission, or the amount deposited, is or is not just compensation for the taking by the plaintiff of the herein described property.

This cause is held open for such other and further orders, judgments, and decrees as may be necessary in the premises.

Dated: This 3rd day of October, 1944, at 3 o'clock P. M.

PAUL J. McCORMICK
United States District Judge

Presented by:

EUGENE D. WILLIAMS

Special Assistant to the Attorney General

WM. J. ADAMS

Special Attorney, Lands Division

Department of Justice

By Eugene D. Williams

Attorneys for Plaintiff [52]

SCHEDULE "A"

Those certain parcels of land in the City of National City, County of San Diego, State of California, more particularly described as follows:

Parcel No. 2. [Description not printed as it is same as set forth in Complaint on page 7.]

Parcel No. 3. [Description not printed as it is same as set forth in Complaint on page 7.] [53]

Parcel No. 4. [Description not printed as it is same as set forth in Complaint on page 8.] [54]

Parcel No. 5. [Description not printed as it is same as set forth in Complaint on page 9.]

Parcel No. 6. [Description not printed as it is same as set forth in Complaint on page 10.] [55]

Parcel No. 7. [Description not printed as it is same as set forth in Complaint on page 10.]

Parcel No. 8. [Description not printed as it is same as set forth in Complaint on page 11.] [56]

Parcel No. 9. [Description not printed as it is same as set forth in Complaint on page 11.]

Parcel No. 10. [Description not printed as it is same as set forth in Complaint on page 12.] [57]

Parcel No. 11. [Description not printed as it is same as set forth in Complaint on page 13.] [58]

PARCEL "A"

That portion of the tidelands lying between the U. S. Bulkhead Line and Pierhead Line of San Diego Bay, National City, County of San Diego, California, described as follows:

[Description not printed as it is same as set forth in Amendment to Complaint on page 24.]

Judgment entered Oct. 3, 1944. Docketed Oct. 3, 1944. C. O. Book 9, page 454. Edmund L. Smith, Clerk; by J. M. Horn, Deputy.

[Endorsed]: Filed Oct. 3, 1944. Edmund L. Smith, Clerk. [59]

[Title of District Court and Cause]

DEMAND FOR TRIAL BY JURY

Comes now Defendant San Francisco Bridge Company, a corporation, and hereby demands a jury trial of the above entitled cause.

H. G. SLOANE

Attorney for Defendant San Francisco
Bridge Company

[Endorsed]: Filed Nov. 30, 1944. Edmund L. Smith, Clerk. [60]

[Title of District Court and Cause]

AMENDED DECLARATION OF TAKING

To the Honorable

The United States District Court:

Whereas heretofore a Declaration of Taking was filed in the above-entitled proceedings with respect to a portion of the hereinafter described land; and

Whereas it is desired to amend said Declaration for the purpose of taking title to the whole of the property involved in the above-entitled proceedings; and

Whereas the United States Maritime Commission has made a determination as to the estimated just compensation for the property hereinafter described and is therefore prepared to have title thereto vest absolutely and in fee simple in the United States of America upon the filing of this amended Declaration in said proceedings.

Now, Therefore, the United States of America and the United States Maritime Commission acting by and through E. S. Land, Chairman of the [61] United States Maritime Commission under and by virtue of the provisions of Title II of the Second War Powers Act, 1942; Public Law No. 247, 77th Congress approved August 25, 1941; the Act of Congress known and described as Public Law No. 474, 77th Congress, approved March 5, 1942; the Merchant Marine Act, 1936, as amended, and the Act of Congress approved February 26, 1931 (46 Stat. 1421) do hereby make and cause to be filed this Declaration of Taking pursuant to said Acts of Congress and by virtue and authority thereof do declare that the land

described in Schedule "A", attached hereto and made a part hereof, and which is the same land described in the amended petition filed in this proceedings, and the fee simple title thereto are hereby taken under the authority of said Acts of Congress, and that the public use for which said land is taken is for the construction of facilities to be used in the construction and repair of ships and the operation of such facilities, and the estate hereby taken in said land for the public use aforesaid is in fee simple absolute, excepting, however, all of the right, title and interest of the United States of America, or its agent, Defense Plant Corporation, in and to said real estate, including all improvements and fixtures located thereon or in any way appertaining thereto, which have heretofore vested in the United States or its agent, Defense Plant Corporation by virtue of the following instruments; agreement dated December 27, 1941, between the Defense Plant Corporation and the Tavares Construction Company, Inc. (Exhibit 1); agreement dated November 27, 1941, between the United States Maritime Commission and the Tavares Construction Company, Inc. (Exhibit 2); lease agreement dated January 1, 1942, between the City of National City and the Tavares Construction Company, Inc. and assignment thereof to the Defense Plant Corporation, dated January 30, 1942, (Exhibit 3); agreement dated October 26, 1943, between the United States Maritime Commission and the Tavares Construction Company, Inc. (Exhibit 4); agreement dated June 30, 1942, between the United States Maritime Commission and the Tavares Construction Company, Inc. (Exhibit 5); agreement dated November 30, 1943, between the United States Maritime Commission and the Tavares Construction Company, Inc. (Exhibit 6), copies of which are attached

hereto as exhibits [62] and incorporated by reference herein.

The United States Maritime Commission hereby states that the sum of money estimated by it as just compensation for the land and improvements thereon hereby taken is \$171,650. Said estimated just compensation is allocated as set forth in Schedule "B", attached hereto and hereby made a part hereof. The United States Maritime Commission hereby deposits in the registry of this Honorable Court for the use of the persons entitled thereto, the amount of estimated compensation set forth in said Schedule "B", and is of the opinion that the ultimate award of damages for the taking of said property will be within the limits prescribed by Congress to be paid as a price therefor.

In Witness Whereof, the petitioner, United States of America has caused this Declaration to be signed in the name of the United States Maritime Commission, the authority empowered by law to acquire the land described in the petition, by its Chairman, E. S. Land, thereunto duly authorized on this 14th day of December, 1944, in the City of Washington, District of Columbia.

UNITED STATES MARITIME COMMISSION

By E. S. Land

Chairman

Attest:

[Illegible]

Assistant Secretary [63]

SCHEDULE "A"

Those Certain Parcels of Land in the City of National City, County of San Diego, State of California, More Particularly Described as Follows:

Parcel 1. [Description not printed as it is same as set forth in Complaint on page 6.]

Parcel 2. [Description not printed as it is same as set forth in Complaint on page 7.]

Parcel 3. [Description not printed as it is same as set forth in Complaint on page 7.] [64]

Parcel 4. [Description not printed as it is same as set forth in Complaint on page 8.] [65]

Parcel 5. [Description not printed as it is same as set forth in Complaint on page 9.]

Parcel 6. [Description not printed as it is same as set forth in Complaint on page 10.] [66]

Parcel 7. [Description not printed as it is same as set forth in Complaint on page 10.]

Parcel 8. [Description not printed as it is same as set forth in Complaint on page 11.] [67]

Parcel 9. [Description not printed as it is same as set forth in Complaint on page 11.]

Parcel 10. [Description not printed as it is same as set forth in Complaint on page 12.] [68]

Parcel 11. [Description not printed as it is same as set forth in Complaint on page 13.] [69]

PARCEL "A"

That portion of the tidelands lying between the U. S. Bulkhead Line and Pierhead Line of San Diego Bay, National City, County of San Diego, California, described as follows:

[Description not printed as it is same as set forth in Amendment to Complaint on page 24.] [70]

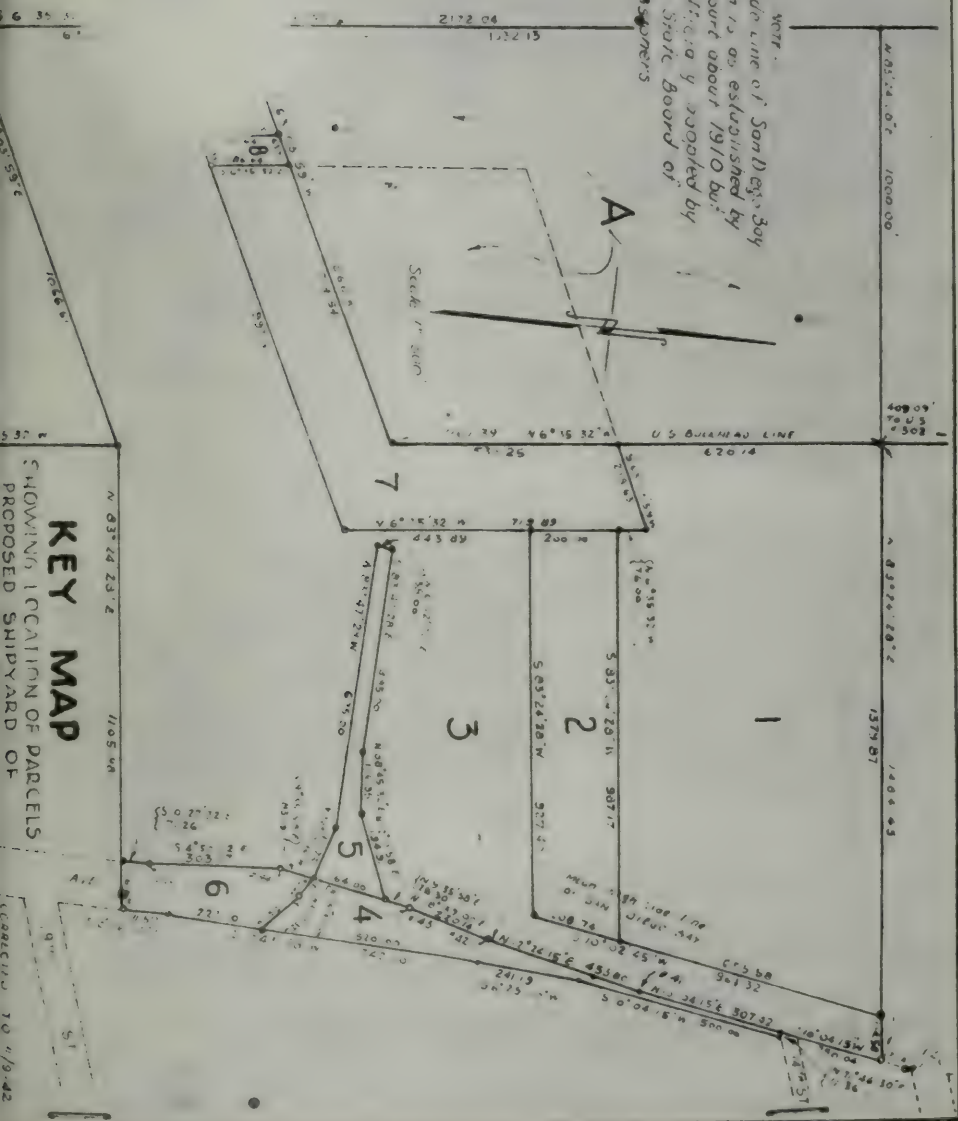
SCHEDULE "B"

<u>Parcel Number</u>	<u>Ostensible Owner</u>	<u>Estimated Just Compensation</u>
1, 2, 3, 5, 6, 7, 8 and A	City of National City	\$161,350.
4	Atchison, Topeka & Santa Fe Railway Company	6,000.
9	Carl A. Johnson & Pearl Johnson	2,100.
10	Santa Fe Land Improvement Company	1,900.
11	San Diego and Arizona Eastern Railway, Inc. [71]	300.

(Photostats)

CHANNEL - SAN DIEGO BAY

NOTE:
The Mean High Tide line of San Diego Bay as shown hereon is as established by George D. Homecourt about 1910 but has not been officially approved by the United States Board of Harbor Commissioners.



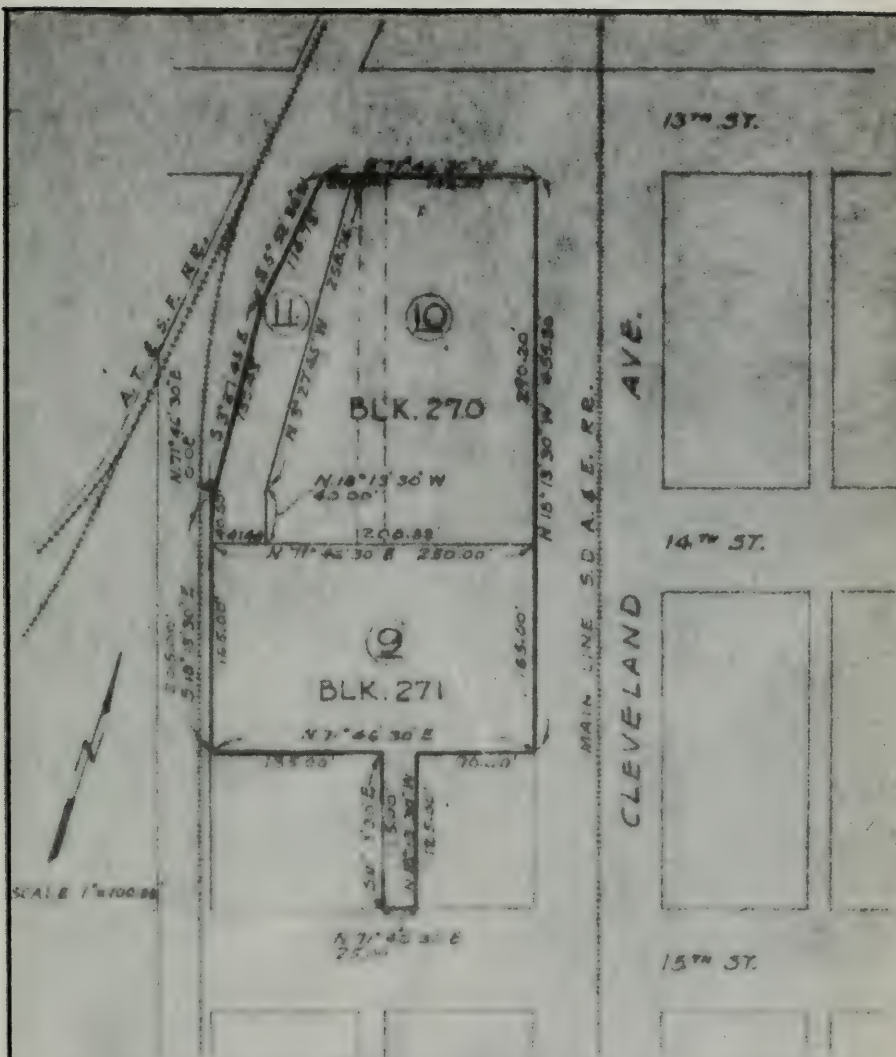


EXHIBIT - B

LOT NO.	AREA	OWNER	ACQUISITION	GENERAL USE
9	1.02	THE S.D.A.E. R.R.	RECEIVED FOR ACQUISITION	RAILROAD RIGHT-OF-WAY
10	1.08	THE S.D.A.E. R.R.	RECEIVED FOR ACQUISITION	
11	1.02	THE S.D.A.E. R.R.	RECEIVED FOR ACQUISITION	

EXHIBIT 1

Tavers

AGREEMENT OF LEASE

PLANCOR-407

This Agreement made and entered into this 27 day of December, 1941, by and between Defense Plant Corporation (hereinafter referred to as "Defense Corporation"), a corporation created by Reconstruction Finance Corporation pursuant to Section 5d of the Reconstruction Finance Corporation Act, as amended, to aid the Government of the United States (hereinafter sometimes called the "Government") in its National Defense Program, and Tavares Construction Company, Inc. (hereinafter called "Lessee"), a corporation organized and doing business under the laws of the State of California;

Witnesseth:

Whereas, the Maritime Commission has advised that the construction of concrete barges and the expansion of facilities within the United States for such construction are essential to the National Defense Program; and

Whereas, the Maritime Commission has advised that for such construction the establishment of additional facilities (such facilities including building slips, tracks, outfitting docks, buildings, and other structures and improvements, being hereinafter sometimes called the "Facilities"), at National City, California, and the acquisition of additional machinery and equipment for use in connection with said Facilities and Lessee's existing facilities (such machinery and equipment, including cranes and other types of movable equipment, but exclusive of items commonly classified as expendable items, being hereinafter

sometimes called the "Machinery"), are in its opinion necessary in the interest of national defense; and

Whereas, Lessee has leased or proposes to lease a site at National City, California, consisting of approximately six (6) acres of land suitable for the location of such additional Facilities (hereinafter called the "Site"); and

Whereas, Lessee has entered into a contract or contracts with the Government for the construction of concrete barges; and the establishment of the additional Facilities above referred to and the acquisition of the Machinery to be provided hereunder are essential to enable Lessee to construct such barges and to expedite completion of such work in accordance with any such contracts; and

Whereas, Lessee represents that, in the price charged the Government for the construction of such barges, there have been eliminated all charges (including amortization and depreciation) for the Site, additional Facilities and Machinery to [74] be provided hereunder, exclusive of the rent, maintenance, taxes and insurance provided for herein;

Now, Therefore, in consideration of the mutual covenants herein contained, it is agreed by and between the parties hereto as follows:

One: Lessee agrees forthwith upon the execution of this agreement to assign or cause to be assigned to Defense Corporation all of its right, title and interest in and to the lease covering the Site with all appurtenant and necessary rights thereto (including all rights which it may have by reason of said lease from National City, California) and Defense Corporation agrees to purchase Lessee's interest in said lease with such rights; provided

the terms thereof and the price thereof shall be satisfactory to Defense Corporation.

Two: Lessee agrees forthwith and from time to time to prepare, or cause to be prepared, and to submit to Defense Corporation and to the Maritime Commission for their approval such plans, designs, specifications, and schedules for the dredging, erection and construction of the Facilities and the acquisition and installation of the Machinery (which shall indicate the estimated cost thereof, stating as to the machinery the estimated price of each item), as they may require, and Lessee agrees, upon approval of such plans, designs, specifications, and schedules by Defense Corporation and the Maritime Commission, to proceed in accordance therewith and complete as soon as practicable the dredging, erection, and construction of the Facilities (hereinafter called the "Construction Program") and the acquisition and installation of the Machinery (hereinafter called the "Acquisition Program"). With the approval of Defense Corporation, Lessee shall have the right to make any alteration in the plans, designs, specifications, and schedules approved pursuant to this paragraph Two, provided, that if such alteration will result in substantial delay in effecting, or a material alteration in the character of, the Programs, or will increase the aggregate cost of said Programs beyond the aggregate amount of such estimates, Lessee shall likewise obtain from the Maritime Commission its approval of such alteration.

Three: In carrying out the work to be performed by it under the Construction Program Lessee may employ such contractors and enter into such contracts with them as it may deem advisable, with the written approval of a designated representative of Defense Corporation,

Four: Defense Corporation shall pay all costs of the Construction Program, from time to time as the work progresses, upon requisition of Lessee approved by Defense Corporation. A representative of Defense Corporation authorized to [75] approve such requisitions on its behalf shall be stationed at the site of construction during such times as Lessee may require.

Five: Lessee shall from time to time advise Defense Corporation, in writing, of the items of Machinery which Lessee shall propose to purchase for the purpose of the Acquisition Program and the estimated cost thereof, and shall forthwith proceed to purchase the same in the name and on behalf of Defense Corporation, provided, however, that no such items shall be purchased or installed if Defense Corporation shall object thereto within three (3) days of the receipt of such written advice. Defense Corporation shall, from time to time, furnish to Lessee such evidence as Lessee may request with reference to its authority to make such purchases on behalf of Defense Corporation.

Six: Lessee shall furnish to Defense Corporation and to the Maritime Commission a description of the Facilities and each item of Machinery so constructed and purchased so as to be capable of identification, and, to the extent practicable, the Facilities and each item of Machinery shall be marked or stamped by Lessee in a way satisfactory to Defense Corporation so as to indicate Defense Corporation's ownership therein.

Seven: All bills of the vendors for Machinery purchased by Lessee for the account of Defense Corporation pursuant to the provisions hereof shall be promptly submitted by Lessee to Defense Corporation accompanied

by a certificate of Lessee, executed by one of its officers duly designated for that purpose, to the effect that the items covered by such bills are included in and necessary in connection with the Acquisition Program, that the prices thereof are in its opinion fair and reasonable, and that such bills are proper for payment. Such bills, and other costs of the Acquisition Program when approved by Defense Corporation, shall be promptly paid by Defense Corporation.

Eight: In the execution of the Programs Lessee agrees to comply with, and give all stipulations and representations required by, applicable federal laws and further agrees to require such compliances, representations, and stipulations with respect to any contract entered into by it with others under such Progress as may be required by applicable federal law; and notwithstanding the generality of the foregoing, Lessee agrees further that in the performance of this agreement it will not discriminate against any worker because of race, creed, color or national origin.

Nine: No salaries of Lessee's executive officers, no fees of its attorneys, no part of the expense incurred in conducting Lessee's offices and no overhead expenses of any kind shall be included in the cost of leasing the Site or of the Programs, except that direct expenses of Lessee's officers or employees and fees of [76] attorneys retained or employed by Lessee in connection with the Program may be so included to the extent approved by Defense Corporation.

Ten: Notwithstanding any other provision herein contained, the maximum amount which Defense Corporation shall be required to expend hereunder shall not

exceed Four Hundred Four Thousand Five Hundred Dollars (\$404,500).

Eleven: Title to the Facilities and Machinery (including Lessee's interest in said lease from National City, California) to be acquired hereunder shall unless and until the same shall be transferred by Defense Corporation in accordance with the provisions hereof, be vested in Defense Corporation, and such Machinery and other removable Facilities shall remain personalty notwithstanding the fact that they may be affixed or attached to realty.

Twelve: Subject to termination upon the terms hereinafter in this paragraph Twelve provided, Defense Corporation hereby agrees to sublease the Site and to lease the Facilities and Machinery to be acquired hereunder, and does hereby sublease the Site, and leases the Facilities and Machinery to be acquired hereunder, to Lessee and Lessee does hereby lease and sublease the same from Defense Corporation for a term ending December 31, 1947, which term, upon its expiration, shall be automatically extended, subject to similar termination for an additional period ending December 31, 1949. Defense Corporation and Lessee each agrees, upon the written request of the other, to execute and deliver such additional instruments of lease as may be necessary to carry out the provisions of this agreement.

This lease or any extension thereof under this paragraph Twelve may be terminated by the parties hereto in the manner hereinafter set forth. At any time when substantial use by Lessee of the Site, Facilities, and Machinery shall be no longer required to enable Lessee to construct boats for the Government, Defense Corporation

may, with the written approval of the Maritime Commission, give written notice to Lessee that such substantial use is no longer required and that Defense Corporation therefore proposes the termination of the lease or extension thereof, and Lessee may give similar written notice to Defense Corporation and to the Maritime Commission stating that Lessee therefore proposes the termination of this lease or extension thereof. The lease, or extension thereof, shall terminate ten (10) days after receipt by Lessee of the notice from Defense Corporation above provided or after receipt by Defense Corporation and the Maritime Commission of the notice from Lessee above provided for, unless within that time Lessee or the Maritime Commission, as the case may be, shall require by notice in writing or by telegraph to the other and to Defense Corporation that the facts necessary to termination, as hereinabove provided, [77] be submitted for determination by arbitrators, in which event the arbitrator to be appointed by the party giving the notice of arbitration shall be named in the notice, the arbitrator to be appointed by the other party to the arbitration (Lessee or the Maritime Commission, as the case may be) shall be named within five (5) days of receipt of such notice of arbitration, and an additional arbitrator shall, within five (5) days of the appointment of the second arbitrator, be selected by the two (2) arbitrators theretofore appointed, but if one of said parties shall have failed to appoint an arbitrator, the sole arbitrator shall arbitrate the question alone. If two (2) arbitrators shall have been appointed by the respective parties to the arbitration and shall have failed to select an additional arbitrator within the above stated time, the additional arbitrator shall be appointed by the Senior Judge of the Circuit

Court of Appeals for the Ninth Circuit, upon application therefor by either of said parties to the arbitration. The decision of a majority of the arbitrators so appointed, or if either party shall have failed to appoint its arbitrator, the decision of the sole arbitrator, shall be final and binding upon the Lessee, the Maritime Commission, and Defense Corporation for all purposes. The cost of arbitration, except the cost of the arbitrator appointed by the Maritime Commission, shall be paid by Lessee. The arbitrators, or the sole arbitrator, as the case may be, shall give prompt notice in writing of the decision to the Maritime Commission, to Lessee and to Defense Corporation, and if the decision establishes that the facts necessary to termination exists, this lease, or extension thereof, shall terminate on the fifth day after the giving of notice of the decision.

Thirteen: In consideration of the covenants herein contained and as rental for the Site, Facilities and Machinery (in addition to the rental for the Site which Lessee leased from National City, California, all of which Lessee agrees to pay during the term of the lease). Lessee agrees to pay to Defense Corporation Eighty-three Thousand Three Hundred Twenty-seven Dollars (\$83,327) for each boat delivered to the Government under or pursuant to its contract for the construction of five (5) concrete barges or any other contract with the Government for the construction of boats, said rent to be paid as each boat is delivered to, and paid for by the Government. When the total amount of rental which Lessee shall be required to pay hereunder shall equal the amount expended by Defense Corporation under this agreement plus interest on each expenditure (such expenditures to include all direct expenses, without over-

head, incurred by Defense Corporation in connection with the Facilities and Machinery or in connection with this agreement) from the date thereof at the rate of four per cent (4%) per annum less an amount equal to interest [78] at four per cent (4%) on each rental payment from the date of payment thereof, Lessee shall not be required to pay any further rental.

Fourteen: Defense Corporation, by notice in writing with the approval of the Maritime Commission noted thereon, may, in addition to all other rights with reference to termination under paragraph Twelve hereof, canceled this lease or extension thereof, in the event (a) all or substantially all of Lessee's contracts with the Government, at any time outstanding, for the construction of concrete barges and other boats shall be terminated or canceled prior to completion, or (b) the Government shall request priority for itself or others with respect to the use of the facilities to be provided hereunder, and Lessee shall fail or refuse to give such priority, or (c) a receiver or trustee is appointed for Lessee or its property, or Lessee makes an assignment for the benefit of creditors, or Lessee become insolvent, or a petition is filed by or against Lessee pursuant to any of the provisions of the United States Bankruptcy Act, as amended, for the purpose of adjudicating Lessee a bankrupt, or for the reorganization of Lessee, or for the purpose of effecting a composition or rearrangement with Lessee's creditors, and any such petition filed against Lessee is not dismissed within sixty (60) days, or (d) of any violation of any of the terms, conditions or covenants of this lease or extension thereof by Lessee and the failure of Lessee to cure such violation within thirty (30) days from the giving of written notice thereof by Defense Corporation

to Lessee. Upon the expiration, termination, or cancellation of this lease or extension thereof, Defense Corporation shall have the right to invoke any remedy permitted by law or in equity for the protection of its interest hereunder, and Lessee hereby expressly waives all rights which it may have to redeem or to be served with any further notice of Defense Corporation's intention to cancel or terminate this lease or extension thereof other than as herein provided.

Fifteen: Upon the expiration or termination of this lease or extension thereof pursuant to paragraph Twelve hereof, or upon cancellation of this lease or extension thereof pursuant to clause (a) of paragraph Fourteen hereof (unless such cancellation shall have been effected because of a violation by Lessee of the contracts referred to in said clause (a)), Lessee shall have and is hereby granted, for a period of ninety (90) days after such termination, expiration, or cancellation (hereinafter referred to as the "Option Period") the right and option, by written notice [79] to Defense Corporation and to the Maritime Commission, to purchase all but not part of the Site, Facilities and Machinery at the following prices:

- (a) At the actual cost to Defense Corporation of the Facilities, Machinery and Defense Corporation's interest in the Site (including all direct expenses, without overhead, incurred by Defense Corporation in connection therewith or in connection with this agreement), plus interest thereon at the rate of four per cent (4%) per annum (such interest to be calculated on each item of disbursement made by Defense Corporation from the date thereof), less the amount of any rentals theretofore paid by

Lessee to Defense Corporation pursuant to the provisions of paragraph Thirteen hereof, together with interest on each such rental payment from the date thereof at the rate of four per cent (4%) per annum; or

- (b) At the actual cost to Defense Corporation of the Facilities, Machinery and Defense Corporation's interest in the Site (including all direct expenses, without overhead, incurred by Defense Corporation in connection therewith or in connection with this agreement), less an amount representing depreciation, obsolescence and loss of value due to use for national defense purposes for each year or fractional part thereof at the following rates for the following classifications of equipment, which classifications shall be determined in connection with the various items as the construction and acquisition of the items comprising the Programs proceed:

1. Buildings, Ways, Docks, Structures, Improvements (fencing, paving, spur tracks, etc.) and Building Installations other than mechanical 5%
2. Installations (mechanical), Movable Equipment, Cranes, Tools, Machinery, Shop Fixtures, Laboratory and Test Equipment, Furniture and Fixtures, Loading and Lifting Trucks, etc. 10%
3. Portable Durable Tools and Automotive Equipment 25%

provided, however, that the minimum residual value on all items shall be 15%; whichever is the higher.

During the Option Period Lessee shall have the right to negotiate with Defense Corporation and the Maritime Commission for the purchase or lease of the Facilities and Machinery, or any portion thereof, and, upon the establishment by the Lessee, Defense Corporation, and the Maritime Commission of mutually satisfactory terms and conditions, Defense Corporation will sell or lease, as the case may be, the property covered thereby to Lessee. Defense Corporation further agrees, to the extent that it lawfully may, that it will not sell the Facilities and Machinery, or any part thereof, to any party or parties other than another branch of the Government (in which event such sale shall be in all respects subject to paragraph Twenty-six hereof) for a period of ninety (90) days following the expiration of the full Option Period unless it shall first have offered the same for sale to Lessee at a price equal to the best offer received by Defense Corporation and Lessee shall have failed or refused to purchase the same within thirty (30) days after the receipt of such offer. In the event of any sale to Lessee pursuant to the provisions of this paragraph, transfer of title shall be made without any representations or warranties whatsoever on the part of Defense Corporation. [80]

Sixteen: So long as this lease remains in full force and effect Lessee shall procure and maintain at its cost insurance on the Facilities and on the Machinery to be acquired hereunder against fire, windstorm, and such other hazards, in such companies, and in such amounts as shall be satisfactory to, or required by, Defense Corporation. The policies evidencing such insurance shall be made payable to, and delivered to, Defense Corporation. In the event of loss under any of the policies, the pro-

ceeds may, upon the written request of Lessee promptly made, be used by Lessee for the repair, restoration, or replacement of the property damaged or destroyed, and to that end Defense Corporation shall promptly make available to Lessee the insurance proceeds received by Defense Corporation. Any property so acquired in replacement shall be the property of Defense Corporation and so identified and shall be subject to all the terms and provisions of this agreement.

Seventeen: Lessee agrees to save Defense Corporation harmless against any liability whatsoever because of accidents or injury to persons or property occurring in the operation of the Facilities or the use of the Machinery by Lessee. Lessee also agrees that during the term of this lease, or any extension thereof, it will procure and maintain at its cost public liability insurance and property damage insurance in such amounts and with such companies as Defense Corporation shall approve or require. The policies evidencing such insurance shall name Defense Corporation as an assured and shall be delivered to Defense Corporation.

Eighteen: Lessee shall use reasonable care in the use and operation of the Site, Facilities and Machinery to be provided hereunder and shall keep the same in good state of repair (ordinary wear and tear, damage or destruction due to causes beyond Lessee's control and without Lessee's negligence, excepted), and upon the expiration, termination, or cancellation of this lease, or extension thereof, and upon expiration of the Option Period, if any, Lessee shall forthwith yield, and place Defense Corporation in peaceful possession of the Site, Facilities and of all the Machinery to be provided hereunder free and clear of any liens and claims other than those result-

ing from claims against Defense Corporation; and if any of the Machinery shall be then located elsewhere than on the Site or Facilities to be provided hereunder, Defense Corporation shall, in addition, have the right to remove, and upon the written request of Lessee, shall promptly remove, at its own expense, the Facilities and Machinery located on the Site, and if such removal shall not take place within sixty (60) days after such request, Lessee may remove the Facilities and Machinery and place the same in storage for the account and at the expense of Defense Corporation, and Defense Corporation shall have corresponding rights and Lessee shall have corresponding rights [81] and obligations with respect to removal and storage of such Facilities and Machinery owned by the Lessee and located on the Site covered by this agreement.

Nineteen: Lessee may, with the consent of Defense Corporation and the Maritime Commission, use such items of Machinery as it may designate in writing to Defense Corporation and the Maritime Commission, in connection with the construction of boats in any other shipyards of Lessee

Twenty: Lessee agrees to pay to the proper authority, when and as the same become due and payable, all taxes, assessments and similar charges which at any time during the term of this lease or any extension thereof may be taxed, assessed or imposed upon Defense Corporation or Lessee with respect to or upon the Site, the Facilities, or the Machinery, or any part thereof, or upon the occupier thereof, or upon the use of the Site, Facilities or Machinery. Lessee also agrees to pay all claims or charges for or on account of water, light, heat, power, and any other service or utility furnished to or

with respect to the Site, the Facilities or the Machinery, or any part thereof.

Twenty-one: In carrying out the Programs and in the operation of the Facilities and any of the Machinery to be acquired hereunder Lessee agrees to comply with all applicable state, municipal and local laws and the rules, orders, regulations and requirements of any departments and bureaus and all local ordinances and regulations, and further agrees to indemnify and hold Defense Corporation harmless from any liability or penalty which may be imposed by local or state authority or any department or bureau thereof, by reason of any asserted violation by Lessee of such laws, rules, orders, ordinances, or regulations.

Twenty-two: Lessee may use such Site, Facilities, and Machinery only for the construction by Lessee of boats for sale to the Government, unless otherwise permitted, in writing, by Defendant Corporation with the consent of the Maritime Commission noted thereon. Lessee also agrees that so long as this lease or extension thereof remains in effect it will eliminate all charges (including all charges for amortization and depreciation), exclusive of the rental, maintenance, taxes and insurance provided for herein and ordinary operating expenses, for the Site, Facilities and the Machinery to be provided hereunder, from any price charged the Government.

Twenty-three: So long as this lease, or any extension thereof, remains in effect, Lessee shall maintain a method of separate accounting of all operations performed, and of all work done in connection with the construction of boats or otherwise by Lessee through the use of the Facilities herein provided, and agrees to make available

to Defense Corporation and the Maritime Commission, for audit and inspection, its records pertaining to the Programs and the operation of the Facilities [82] and any of the Machinery, the number of boats constructed and/or other operations performed by Lessee as above stated, and the payments therefor. Defense Corporation and the Maritime Commission shall have the right to inspect the Site, Facilities, and Machinery to be provided hereunder at all reasonable times during the continuance of this lease or extension thereof.

Twenty-four: Lessee will not without prior written consent of Defense Corporation and the approval of the Maritime Commission sell, assign, or pledge this lease or any of its rights or obligations hereunder, or sublease or permit the use by others of any of the property covered by this lease.

Twenty-five: The failure of Defense Corporation to insist, in any one or more instances, upon performance of any of the terms, covenants, or conditions of this agreement shall not be construed as a waiver or a relinquishment of the future performance of any such term, covenant, or condition, but Lessee's obligation with respect to such future performance shall continue in full force and effect.

Twenty-six: It is contemplated that the lease of the Site, Facilities, and Machinery to be provided hereunder may be transferred and conveyed to another branch of the Government and, upon such transfer, the Government, acting through the Maritime Commission, shall succeed to all the rights, powers, privileges, discretion,

and obligations of Defense Corporation hereunder, retaining, however, all discretion and power of approval herein vested in the Maritime Commission. In the event of such transfer, Defense Corporation shall cease to have any rights, duties, or obligations hereunder and all powers in Defense Corporation to give any notices, consents, or approvals or to raise any objections, and the right of Defense Corporation to receive any notices provided for herein shall terminate and thereafter shall be vested in the Maritime Commission.

Twenty-seven: No member of or Delegate to the Congress of the United States of America shall be admitted to any share or part of this agreement or to any benefit arising therefrom.

Twenty-eight: It is understood and agreed that whenever provision is made herein for the designation by Defense Corporation of a representative or representatives, or reference is made to such representatives of Defense Corporation, Defense Corporation may designate as any one or more of such representatives, a representative or representatives of the Maritime Commission.

Twenty-nine: Whenever used herein, the term "Maritime Commission" shall mean the United States Maritime Commission. [83]

Thirty: Any notice required to be given to the Maritime Commission under the provisions of this agreement shall be addressed in writing to the Secretary of the United States Maritime Commission, Commerce Building, Washington, D. C.

In Witness Whereof, the parties hereto have caused their corporate seals to be hereunto affixed, and these presents to be signed by their duly authorized officers the day and year first above written.

DEFENSE PLANT CORPORATION

By (Signed) John W. Snyder
Executive Vice President

(Seal)

Attest: (Signed) A. T. Hobson
Secretary

Signed and sealed in the presence of:

(Signed) Barbara P. Teagle

(Signed) Mary Jean Ott

TAVARES CONSTRUCTION COMPANY, INC.

By (Signed) Carlos Tavares
President

(Seal)

Attest: (Signed) Don F. Gates
Secretary

Signed and sealed in the presence of:

(Signed) Henry M. Page

(Signed) Frank A. Witt

District of Columbia: ss.

On this 7th day of January, 1942, before me appeared John W. Snyder, to me personally known, who, being by me duly sworn did say that he is the Executive Vice President of Defense Plant Corporation; that the seal affixed to the foregoing instrument is the corporate seal of said Corporation; that said instrument was signed

and sealed in behalf of said Corporation by authority of its board of directors; and said John W. Snyder acknowledged said instrument to be the free act and deed of said Corporation.

In Witness Whereof, I have hereunto affixed my official signature with the seal of my office the day and year above written.

(Seal) (Signed) Thomas S. Kelly, 3rd
Notary Public, District of Columbia

My commission expires September 1, 1946

State of California
County of Los Angeles—ss.

On this 28 day of December, 1941, before me appeared Carlos Tavares, to me personally known, who, being by me duly sworn did say that he is the President of Tavares Construction Company, Inc., that the seal affixed to the foregoing instrument is the corporate seal of said Corporation; that said instrument was signed and sealed in behalf of said Corporation by authority of its board of directors; and said Carlos Tavares acknowledged said instrument to be the free act and deed of said Corporation.

In Witness Whereof, I have hereunto affixed my official signature with the seal of my office the day and year above written.

(Seal) (Signed) Myrtle V. Hitchcock
Notary Public

My commission expires Apr. 15, 1945 [84]

Tavares
(Amendatory #1)
(Plancor 407)

AGREEMENT AMENDING AGREEMENT OF
LEASE

This Amendatory Agreement, made and entered into this 13th day of April, 1942, by and between Defense Plant Corporation (hereinafter referred to as "Defense Corporation"), a corporation created by Reconstruction Finance Corporation pursuant to Section 5d of the Reconstruction Finance Corporation Act, as amended, to aid the Government of the United States in its National Defense Program and Tavares Construction Company, Inc. (hereinafter called "Lessee"), a corporation organized and doing business under the laws of the State of California;

Witnesseth:

Whereas, an agreement of lease was entered into on the 27th day of December, 1941, by and between Defense Corporation and Lessee covering the lease by Defense Corporation to Lessee of Facilities and Machinery for the purpose of enabling Lessee to increase production and to extend its capacity for the production of concrete barges for the United States Government in connection with the National Defense Program; and

Whereas, said agreement of lease dated December 27, 1941, provided, among other things, that the maximum amount which Defense Corporation would be required to expend thereunder for the acquisition of Facilities and Machinery leased to Lessee as aforesaid, should not ex-

ceed Four Hundred Four Thousand Five Hundred Dollars (\$404,500); and

Whereas, Lessee has advised that due to the necessity of further expanding its capacity for the production of concrete barges, said amount is insufficient and has requested that said maximum amount be increased by One Hundred Ninety-one Thousand Eight Hundred Fifteen Dollars (\$191,815); and

Whereas, the Maritime Commission has advised that the increase as requested by Lessee as aforesaid, has its approval;

Now, Therefore, in consideration of the premises it is agreed by and between the parties hereto that said agreement of lease entered into on December 27, 1941, by and between Defense Corporation and Lessee be and the same hereby is amended in the following particulars:

By striking therefrom paragraph Ten and substituting in lieu and in place of said paragraph Ten the following paragraph Ten: [85]

Ten: Notwithstanding any other provision herein contained, the maximum amount which Defense Corporation shall be required to expend hereunder shall not exceed Five Hundred Ninety-six Thousand Three Hundred Fifteen Dollars (\$596,315).

In Witness Whereof, the parties hereto have caused their corporate seals to be hereunto affixed, and these

presents to be signed by their duly authorized officers the day and year first above written.

DEFENSE PLANT CORPORATION

By (Signed) Sam H. Husbands

President

(Seal)

Attest: (Signed) A. T. Hobson

Secretary

Signed and sealed in the presence of

(Signed) Francis P. Collins

(Signed) Mary Jean Ott

TAVARES CONSTRUCTION COMPANY, INC.

By (Signed) Carlos Tavares

President

(Seal)

Attest: (Signed) Don F. Gates

Secretary

Signed and sealed in the presence of:

(Signed) Gregory D. Smith

(Signed) Grace D. Horton

District of Columbia: ss.

On this 24th day of April, 1942, before me appeared Sam H. Husbands, to me personally known, who, being by me duly sworn did say that he is the President of Defense Plant Corporation; that the seal affixed to the foregoing instrument is the corporate seal of said Corporation; that said instrument was signed and sealed in

behalf of said Corporation by authority of its board of directors; and said Sam H. Husbands acknowledged said instrument to be the free act and deed of said Corporation.

In Witness Whereof, I have hereunto affixed my official signature with the seal of my office the day and year above written.

(Seal)

(Signed) Charles J. Buettner

Notary Public, District of Columbia

My commission expires March 14, 1946

State of California

County of San Diego—ss.

On this 13th day of April, 1942, before me appeared Carlos Tavares, to me personally known, who, being by me duly sworn did say that he is the President of Tavares Construction Company, Inc., that the seal affixed to the foregoing instrument is the corporate seal of [86] said Corporation; that said instrument was signed and sealed in behalf of said Corporation by authority of its board of directors; and said Carlos Tavares acknowledged said instrument to be the free act and deed of said Corporation.

In Witness Whereof, I have hereunto affixed my official signature with the seal of my office the day and year above written.

(Seal)

(Signed) Grace D. Horton

Notary Public

My commission expires February 5, 1946

Tavares
(Amendatory #2)
(Plancor 407)

AGREEMENT AMENDING AGREEMENT OF
LEASE

This Amendatory Agreement, made and entered into this First day of July, 1942, by and between Defense Plant Corporation (hereinafter referred to as "Defense Corporation"), a corporation created by Reconstruction Finance Corporation pursuant to Section 5d of the Reconstruction Finance Corporation Act, as amended, to aid the Government of the United States in its National Defense Program, and Tavares Construction Company, Inc. (hereinafter called "Lessee"), a corporation organized and doing business under the laws of the State of California;

Witnesseth:

Whereas, an agreement of lease was entered into on the 27th day of December, 1941, by and between Defense Corporation and Lessee covering the lease by Defense Corporation to Lessee of Facilities and Machinery for the purpose of enabling Lessee to increase production and to extend its capacity for the production of concrete barges for the United States Government in connection with the National Defense Program; and

Whereas, said Agreement of Lease was amended by an Agreement Amending Agreement of Lease dated April

13, 1942 amending paragraph Ten thereof by increasing the overall amount to Five Hundred Ninety-six Thousand Three Hundred Fifteen Dollars (\$596,315); and

Whereas, Defense Corporation and Lessee are now desirous of further amending said lease dated December 27, 1941, so as to provide for additional rental for the use of the additional Facilities provided for under said Agreement Amending Agreement of Lease dated April 13, 1942 increasing the maximum amount by One Hundred Ninety-one Thousand Eight Hundred Fifteen Dollars (\$191,815); and

Whereas, the Maritime Commission has advised that the additional rental for said additional Facilities has its approval;

Now, Therefore, in consideration of the premises it is agreed by and between the parties hereto that said agreement of lease entered into on December 27, 1941, by and between Defense Corporation and Lessee, as amended by Agreement Amending Agreement of Lease dated April 13, 1942, be and the same hereby is further amended in the following particulars:

By striking therefrom paragraph Thirteen and substituting in lieu and in place of said paragraph Thirteen the following paragraph Thirteen: [88]

Thirteen: In consideration of the covenants herein contained and as rental for the Site, Facilities and Machinery (in addition to the rental for the Site

which Lessee leased from National City, California, all of which Lessee agrees to pay during the term of the Lease), Lessee agrees to pay to Defense Corporation One Hundred Twenty-two Thousand Eight Hundred Forty Dollars (\$122,840) for each boat delivered to the Government under or pursuant to its contract for the construction of five (5) concrete barges or any other contract with the Government for the construction of boats; said rent to be paid as each boat is delivered to, and paid for by the Government. When the total amount of rental which Lessee shall be required to pay hereunder shall equal the amount expended by Defense Corporation under this agreement plus interest on each expenditure (such expenditures to include all direct expenses, without overhead, incurred by Defense Corporation in connection with the Facilities and Machinery or in connection with this agreement) from the date thereof at the rate of four per cent (4%) per annum less an amount equal to interest at four per cent (4%) on each rental payment from the date of payment thereof, Lessee shall not be required to pay further rental.

In Witness Whereof, the parties hereto have caused their corporate seals to be hereunto affixed, and these presents to be signed by their duly authorized [89] officers the day and year first above written.

DEFENSE PLANT CORPORATION

By (Signed) John W. Snyder
Executive Vice President
(Seal)

Attest: (Signed) Leo Nielson
Assistant Secretary

Signed and sealed in the presence of:

(Signed) Sam B. Newman

(Signed) Mary Jean Ott

TAVARES CONSTRUCTION COMPANY, INC.

By (Signed) Carlos Tavares
President
(Seal)

Attest: (Signed) Don F. Gates
Secretary

Signed and sealed in the presence of:

(Signed) Gregory D. Smith

(Signed) Inez E. Carr

District of Columbia: ss.

On this 13th day of July, 1942, before me appeared John W. Snyder, to me personally known, who, being by me duly sworn did say that he is the Executive Vice President of Defense Plant Corporation; that the seal affixed to the foregoing instrument is the corporate seal of said Corporation; that said instrument was signed and sealed in behalf of said Corporation by authority of its board of directors; and said John W. Snyder acknowl-

edged said instrument to be the free act and deed of said Corporation.

In Witness Whereof, I have hereunto affixed my official signature with the seal of my office the day and year above written.

(Seal) (Signed) Thomas S. Kelly, 3rd
Notary-Public, District of Columbia

My commission expires September 1, 1946

State of California
County of San Diego—ss.

On this 1 day of July, 1942, before me appeared Carlos Tavares, to me personally known, who, being by me duly sworn did say that he is the President of Tavares Construction Company, Inc., that the seal affixed to the foregoing instrument is the corporate seal of said Corporation; that said instrument was signed and sealed in behalf of said Corporation by authority of its board of directors; and said Carlos Tavares acknowledged said instrument to be the free act and deed of said Corporation.

In Witness Whereof, I have hereunto affixed my official signature with the seal of my office the day and year above written.

(Seal) (Signed) Grace D. Horton
Notary Public

My commission expires Feb. 5, 1946 [90]

Tavares

Amendatory #3

(Plancor 407)

AGREEMENT AMENDING AGREEMENT OF
LEASE

This Amendatory Agreement, made and entered into this 29th day of July, 1942, by and between Defense Plant Corporation (hereinafter referred to as "Defense Corporation"), a corporation created by Reconstruction Finance Corporation pursuant to Section 5d of the Reconstruction Finance Corporation Act, as amended, to aid the Government of the United States in its National Defense Program, and Tavares Construction Company, Inc. (hereinafter called "Lessee"), a corporation organized and doing business under the laws of the State of California;

Witnesseth:

Whereas, an agreement of lease was entered into on the 27th day of December, 1941, by and between Defense Corporation and Lessee covering the least by Defense Corporation to Lessee of facilities for the purpose of enabling Lessee to increase production and to extend its capacity for the production of concrete barges for the United States Government in connection with the National Defense Program; and

Whereas, said agreement of lease dated December 27th, 1941, as amended, provided, among other things, that the maximum amount which Defense Corporation would be

required to expend thereunder for the acquisition of facilities leased to Lessee as aforesaid, should not exceed Five Hundred Ninety-six Thousand Three Hundred Fifteen Dollars (\$596,315); and

Whereas, Lessee has advised that due to the necessity of further expanding its capacity for the production of concrete barges, said amount is insufficient and has requested that said amount be increased by Ninety-two Thousand One Hundred Nineteen Dollars(\$92,119); and

Whereas, the Maritime Commission has advised the increase as requested by Lessee as aforesaid, has its approval;

Now, therefore, in consideration of the premises it is agreed by and between the parties hereto that said agreement of lease entered into on the 27th day of December, 1941, by and btween Defense Corporation and Lessee be and the same hereby is further amended in the following particulars: [91]

By striking therefrom paragraph Ten and substituting in lieu and in place of said paragraph Ten the following paragraph Ten:

Ten: Notwithstanding any other provisions herein contained, the maximum amount which Defense Corporation shall be required to expend hereunder shall not exceed Six Hundred Eighty-eight Thousand Four Hundred Thirty-four Dollars (\$688,434).

In Witness Whereof, the parties hereto have caused their corporate seals to be hereunto affixed, and these presents to be signed by their duly authorized officers the day and year first above written.

DEFENSE PLANT CORPORATION

By (Signed) Sam H. Husbands

President

(Seal)

Attest: (Signed) Leo Nielson

Assistant Secretary

Signed and sealed in the presence of:

(Signed) Sam B. Newman

(Signed) Grace R. Clark

TAVARES CONSTRUCTION COMPANY, INC.

By (Signed) Carlos Tavares

President

(Seal)

Attest: (Signed) Don F. Gates

Secretary

Signed and sealed in the presence of:

(Signed) Gregory D. Smith

(Signed) Inez E. Carr

District of Columbia: ss.

On this 14th day of August, 1942, before me appeared Sam H. Husbands, to me personally known, who, being by me duly sworn did say that he is the President of Defense Plant Corporation; that the seal affixed to the foregoing instrument is the corporate seal of said Corporation; that said instrument was signed and sealed in

behalf of said Corporation by authority of its board of directors; and said Sam H. Husband acknowledged said instrument to be the free act and deed of said Corporation.

In Witness Whereof, I have hereunto affixed my official signature with the seal of my office the day and year above written.

(Seal) (Signed) Thomas S. Kelly, 3rd
Notary Public, District of Columbia

My commission expires September 1, 1946

State of California
County of San Diego—ss.

On this 29 day of July, 1942, before me appeared Carlos Tavares, to me personally known, who, being by me duly sworn did say that he is the President of Tavares Construction [92] Company, Inc., that the seal affixed to the foregoing instrument is the corporate seal of said Corporation; that said instrument was signed and sealed in behalf of said Corporation by authority of its board of directors; and said Carlos Tavares acknowledged said instrument to be the free act and deed of said Corporation.

In Witness Whereof, I have hereunto affixed my official signature with the seal of my office the day and year above written.

(Seal) (Signed) Grace D. Horton
Notary Public, San Diego Co., California

My commission expires Feb. 5, 1946 [93]

Tavares

(Amendatory #4)

(Plancor 407)

AGREEMENT AMENDING AGREEMENT OF
LEASE

This Amendatory Agreement, made and entered into this 12th day of August, 1942, by and between Defense Plant Corporation (hereinafter referred to as "Defense Corporation"), a corporation created by Reconstruction Finance Corporation pursuant to Section 5d of the Reconstruction Finance Corporation Act, as amended, to aid the Government of the United States in its National Defense Program, and Tavares Construction Company, Inc. (hereinafter called "Lessee"), a corporation organized and doing business under the laws of the State of California;

Witnesseth:

Whereas, an agreement of lease was entered into on the 27th day of December, 1941, by and between Defense Corporation and Lessee covering the lease by Defense Corporation to Lessee of Facilities and Machinery for the purpose of enabling Lessee to increase production and to extend its capacity for the production of concrete barges for the United States Government in connection with the National Defense Program; and

Whereas, said agreement of lease, as subsequently amended, provided among other things that the maximum

amount which Defense Corporation would be required to expend thereunder for the acquisition of facilities leased to Lessee as aforesaid, should not exceed Six Hundred Eighty-eight Thousand Four Hundred Thirty-four Dollars (\$688,434); and

Whereas, Lessee has advised that due to the necessity of further expanding its capacity for the production of concrete barges, said amount is insufficient and has requested that said amount be increased by One Million Two Hundred Eighty-seven Thousand Six Hundred Fifty-seven Dollars (\$1,287,657); and

Whereas, Defense Corporation and Lessee are now desirous of further amending said lease dated December 27, 1941, so as to provide for the aforesaid increase and to provide for additional rental for the use of the additional Facilities provided for by said increase; and

Whereas, the Maritime Commission has advised that the increase as requested by Lessee as aforesaid, has its approval;

Now, Therefore, in consideration of the premises it is agreed by and between the parties hereto that said agreement of lease entered into on December [94] 27, 1941, by and between Defense Corporation and Lessee, as subsequently amended, be and the same hereby is further amended in the following particulars:

By striking therefrom paragraphs Ten and Thirteen and substituting in lieu and in place of said

paragraphs Ten and Thirteen the following paragraphs Ten and Thirteen:

Ten: Notwithstanding any other provisions herein contained, the maximum amount which Defense Corporation shall be required to expend hereunder shall not exceed One Million Nine Hundred Seventy-six Thousand Ninety-one Dollars (\$1,976,091).

Thirteen: In consideration of the covenants herein contained, and as rental for the Site, Facilities and Machinery (in addition to the rental for the Site which Lessee leased from National City, California, all of which Lessee agrees to pay during the term of the Lease), Lessee agrees to pay to Defense Corporation One Hundred Forty Thousand Dollars (\$140,000) for each of the first five (5) boats delivered to the Government and Seventy-seven Thousand Two Hundred Sixty Dollars (\$77,260) on each boat thereafter delivered to the Government under or pursuant to its contract for the construction of twenty-two (22) concrete barges or any other contract with the Government for the construction of boats; said rent to be paid as each boat is delivered to, and paid for by the Government.

In Witness Whereof, the parties hereto have caused their corporate seals to be hereunto affixed, and these presents to be signed by their duly authorized [95] officers the day and year first above written.

DEFENSE PLANT CORPORATION

By (Signed) John W. Snyder
Executive Vice President
(Seal)

Attest: (Signed) Leo Nielson
Assistant Secretary

Signed and sealed in the presence of:

(Signed) Jean R. Switzer
(Signed) Sam B. Newman

TAVARES CONSTRUCTION COMPANY, INC.

By (Signed) Carlos Tavares
President
(Seal)

Attest: (Signed) Don F. Gates
Secretary

Signed and sealed in the presence of:

(Signed) R. S. Seabrook
(Signed) Lydia McKenzie

District of Columbia: ss.

On this 1st day of Sept., 1942, before me appeared John W. Snyder, to me personally known, who, being by me duly sworn did say that he is the Executive Vice President of Defense Plant Corporation; that the seal affixed to the foregoing instrument is the corporate seal of said Corporation; that said instrument was signed and sealed in behalf of said Corporation by authority of its

board of directors; and said John W. Snyder acknowledged said instrument to be the free act and deed of said Corporation.

In Witness Whereof, I have hereunto affixed my official signature with the seal of my office the day and year above written.

(Seal)

(Signed) Thomas S. Kelly, 3rd

Notary Public, District of Columbia

My commission expires September 1, 1946

State of California

County of San Diego—ss.

On this 12th day of August, 1942, before me appeared Carlos Tavares, to me personally known, who, being by me duly sworn did say that he is the President of Tavares Construction Company, Inc., that the seal affixed to the foregoing instrument is the corporate seal of said Corporation; that said instrument was signed and sealed in behalf of said Corporation by authority of its board of directors; and said Carlos Tavares acknowledged said instrument to be the free act and deed of said Corporation.

In Witness Whereof, I have hereunto affixed my official signature with the seal of my office the day and year above written.

(Seal)

(Signed) Grace D. Horton

Notary Public, San Diego Co., Cal.

My commission expires Feb. 5, 1946 [96]

Tavares
(Amendatory #5)
Plancor 407

AGREEMENT AMENDING AGREEMENT OF LEASE

This Amendatory Agreement, made and entered into this 11 day of November, 1942, by and between Defense Plant Corporation (hereinafter referred to as "Defense Corporation"), a corporation created by Reconstruction Finance Corporation pursuant to Section 5d of the Reconstruction Finance Corporation Act, as amended, to aid the Government of the United States in its National Defense Program, and Tavares Construction Company, Inc. (hereinafter called "Lessee"), a corporation organized and doing business under the laws of the State of California;

Witnesseth:

Whereas, an Agreement of Lease was entered into on the 27th day of December, 1941, by and between Defense Corporation and Lessee covering the lease by Defense Corporation to Lessee of a Site, Facilities and Machinery for the purpose of enabling Lessee to increase production and to extend its capacity for the production of concrete barges for the United States Government in connection with the National Defense Program; and

Whereas, said Agreement of Lease was amended by agreements dated April 13, 1942, July 1, 1942, July 29, 1942 and August 12, 1942; and

Whereas, said Agreement of Lease, as amended, provided, among other things, that the maximum amount

which Defense Corporation would be required to expend thereunder should not exceed One Million Nine Hundred Seventy-six Thousand Ninety-one Dollars (\$1,976,091); and

Whereas, Lessee has advised that due to the necessity of removing existing facilities from land which has been taken by the Government for other purposes and the necessity of acquiring additional facilities, said amount is insufficient and Lessee accordingly has requested that said amount be increased by Two Hundred Eighty-four Thousand Five Hundred Forty-nine Dollars (\$284,549); and

Whereas, the Maritime Commission has advised that the increase requested by Lessee has its approval; and

Whereas, the Government is proceeding to acquire title to additional land to be used as a part of the Site for the facilities which are to be removed from or which were to have been placed upon the aforesaid land taken by the Government for other purposes (such land and the balance of the land heretofore constituting the Site being hereinafter referred to as "the Site"); and [97]

Whereas, upon acquisition of title to such additional land by the Government the Maritime Commission has indicated that it will cause the same to be conveyed to Defense Corporation upon receipt of payment of the cost thereof;

Now, Therefore, in consideration of the premises it is agreed by and between the parties hereto that said Agree-

ment of Lease entered into on December 27, 1941, by and between Defense Corporation and Lessee, as amended, be and the same hereby is further amended in the following particulars:

By striking therefrom paragraphs Ten and Thirteen, and substituting in lieu of said paragraphs the following paragraphs Ten and Thirteen:

Ten: Notwithstanding any other provisions herein contained, the maximum amount which Defense Corporation shall be required to expend hereunder shall not exceed Two Million Two Hundred Sixty Thousand Six Hundred Forty Dollars (\$2,260,640).

Thirteen: In consideration of the covenants herein contained, and as rental for the Site, Facilities and Machinery (in addition to the rental for that part of the Site which Lessee leased from National City, California, which Lessee agrees to pay during the term of the Lease), Lessee agrees to pay to Defense Corporation One Hundred Forty Thousand Dollars (\$140,000) for each of the first five (5) boats delivered to the Government and Ninety-four Thousand Three Hundred Seventy-five Dollars (\$94,375) on each boat thereafter delivered to the Government under or pursuant to its contract for the construction of twenty-two (22) concrete barges or any other contract with the Government for the construction of boats; said rent to be paid as each boat is delivered to, and paid for by the Government.

By adding thereto the following new paragraph
Thirty-one:

Thirty-one: Lessee agrees that when Defense Corporation shall have acquired title to that part of the Site now being condemned by the Government, the Agreement of Lease, dated December 27, 1941, as amended, shall be further amended so as to provide for an increase in the maximum amount of expenditures to be made by Defense Corporation in the amount of the cost thereof to Defense Corporation (which amount shall not exceed the cost thereof to the Government), and an increase in the [98] amount of rental to be paid by Lessee under said Agreement of Lease, as amended, in an amount sufficient to cover the cost of such part of the Site. Lessee further agrees that in the event the property leased to Lessee under said Agreement of Lease, as amended, should be transferred to another branch of the Government pursuant to paragraph Twent-six thereof prior to the acquisition by Defense Corporation of title to that part of the Site now being condemned by the Government, Lessee will, if it should thereafter elect to exercise the option to purchase conferred by paragraph Fifteen of said Agreement of Lease, as amended, pay to the Government the cost to it of such part of the Site on the same basis as if such cost had been part of the cost to Defense Corporation of the property leased to Lessee under said Agreement of Lease, as amended.

In Witness Whereof, the parties hereto have caused their corporate seals to be hereunto affixed, and these presents to be signed by their duly authorized officers the day and year first above written.

DEFENSE PLANT CORPORATION

By (Signed) John W. Snyder
Executive Vice President
(Seal)

Attest: (Signed) Leo Nielson
Secretary

Signed and sealed in the presence of:

(Signed) Sam B. Newman
(Signed) Jean R. Switzer

TAVARES CONSTRUCTION COMPANY, INC.

By (Signed) Carlos Tavares
President
(Seal)

Attest (Signed) Don F. Gates
Secretary

Signed and sealed in the presence of:

(Signed) Gregory D. Smith
(Signed) T. W. Eisenman

District of Columbia: ss.

On this 17 day of November, 1942, before me appeared John W. Snyder, to me personally known, who, being by me duly sworn did say that he is the Executive Vice President of Defense Plant Corporation; that the seal affixed to the foregoing instrument is the corporate seal of said Corporation; that said instrument was signed

and sealed in behalf of said Corporation by authority of its board of directors; and said John W. Snyder acknowledged said instrument to be the free act and deed of said Corporation.

In Witness Whereof, I have hereunto affixed my official signature with the [99] seal of my office the day and year above written.

(Seal) (Signed) Thomas S. Kelly, 3rd
Notary Public, District of Columbia

My commission expires September 1, 1946

State of California

County of San Diego—ss.

On this 11th day of November, 1942, before me appeared Carlos Tavares, to me personally known, who, being by me duly sworn did say that he is the President of Tavares Construction Company, Inc., that the seal affixed to the foregoing instrument is the corporate seal of said Corporation; that said instrument was signed and sealed in behalf of said Corporation by authority of its board of directors; and said Tavares Construction Co., Inc. acknowledged said instrument to be the free act and deed of said Corporation.

In Witness Whereof, I have hereunto affixed my official signature with the seal of my office the day and year above written.

(Seal) (Signed) Grace D. Horton
Notary Public, San Diego Co., Cal.

My commission expires Feb. 5, 1946 [100]

Tavares
(Amendatory #6)
Pancor 407

AGREEMENT AMENDING AGREEMENT OF LEASE

This Amendatory Agreement, made and entered into this 9th day of March, 1943, by and between Defense Plant Corporation (hereinafter referred to as "Defense Corporation"), a corporation created by Reconstruction Finance Corporation pursuant to Section 5d of the Reconstruction Finance Corporation Act, as amended, to aid the Government of the United States (hereinafter sometimes called the "Government") in its National Defense Program, and Tavaras Construction Company, Inc. (hereinafter called "Lessee"), a corporation organized and doing business under the laws of the State of California;

Witnesseth:

Whereas, an Agreement of Lease was entered into on the 27th day of December, 1941, by and between Defense Corporation and Lessee covering the lease by Defense Corporation to Lessee of a Site, Facilities and Machinery for the purpose of enabling Lessee to increase production and to extend its capacity for the production of concrete barges for the United States Government in connection with the National Defense Program; and

Whereas, said Agreement of Lease was amended by agreements dated April 13, 1942, July 1, 1942, July 29, 1942, August 12, 1942 and November 11, 1942; and

Whereas, said Agreement of Lease, as amended, provided, among other things, that the maximum amount which Defense Corporation would be required to expend thereunder should not exceed Two Million Two Hundred Sixty Thousand Six Hundred Forty Dollars (\$2,260,640); and

Whereas, Lessee has advised that said amount is insufficient and Lessee accordingly has requested that said amount be increased by Five Hundred Thirty-seven Thousand Four Hundred Twenty-six Dollars (\$537,426); and

Whereas, the Maritime Commission has advised that the increase requested by Lessee has its approval;

Now, Therefore, in consideration of the premises it is agreed by and between the parties hereto that said Agreement of Lease entered into on December 27, 1941, by and between Defense Corporation and Lessee, as amended, be and the same hereby is further amended by striking therefrom paragraphs Ten and Thirteen, and substituting in lieu of said paragraphs the following paragraphs Ten and Thirteen: [101]

Ten: Notwithstanding any other provisions herein contained, the maximum amount which Defense Corporation shall be required to expend hereunder shall not exceed Two Million Seven Hundred Ninety-eight Thousand Sixty-six Dollars (\$2,798,066).

Thirteen: In consideration of the covenants herein contained, and as rental for the Site, Facilities and Machinery (in addition to the rental for that part of the Site which Lessee leased from National City, California, which Lessee agrees to pay during the term of the Lease), Lessee agrees to pay to Defense Corporation One Hundred Forty Thousand Dollars (\$140,000) for each of the first five (5) boats delivered to the Government and One Hundred Twenty-seven Thousand Dollars (\$127,000) on each boat thereafter delivered to the Government under or pursuant to its contract for the construction of twenty-two (22) concrete barges or any other contract with the Government for the construction of boats, said rent to be paid as each boat is delivered to, and paid for by the Government, when the total amount of rental which Lessee shall be required to pay hereunder shall equal the amount expended by Defense Corporation under this agreement (including all direct expenses, without overhead, incurred by Defense Corporation in connection with the Site, Facilities and Machinery or in connection with this agreement) plus interest on each expenditure from the date thereof at the rate of four per cent (4%) per annum less an amount equal to interest at four per cent (4%) on each rental payment from the date of payment thereof, Lessee shall not be required to pay further rental.

In Witness Whereof, the parties hereto have caused their corporate seals to be hereunto affixed, and these presents to be signed by their duly authorized [102] officers the day and year first above written.

DEFENSE PLANT CORPORATION

By (Signed) Frank T. Ronan

Vice President

(Seal)

Attest: (Signed) Leo Nielson

Secretary

Signed and sealed in the presence of:

(Signed) Muriel Krevolin

(Signed) Jean R. Switzer

TAVARES CONSTRUCTION COMPANY, INC.

By (Signed) Carlos Tavares

President

(Seal)

Attest (Signed) Don F. Gates

Secretary

Signed and sealed in the presence of:

(Signed) Gregory D. Smith

(Signed) Inez E. Carr

District of Columbia: ss.

On this 18th day of March, 1943, before me appeared Frank T. Ronan, to me personally known, who, being by me duly sworn did say that he is the Vice President of Defense Plant Corporation, that the seal affixed to the foregoing instrument is the corporate seal of said Cor-

poration, that said instrument was signed and sealed in behalf of said Corporation by authority of its board of directors, and said Frank T. Ronan acknowledged said instrument to be the free act and deed of said Corporation.

In Witness Whereof, I have hereunto affixed my official signature with the seal of my office the day and year above written.

(Seal) (Signed) Susan I. Allen
Notary Public, District of Columbia

My commission expires July 14, 1947

State of California
County of San Diego—ss.

On this 9th day of March, 1943, before me appeared Carlos Tavares, to me personally known, who, being by me duly sworn did say that he is the President of Tavares Construction Company, Inc., that the seal affixed to the foregoing instrument is the corporate seal of said Corporation; that said instrument was signed and sealed in behalf of said Corporation by authority of its board of directors; and said Carlos Tavares acknowledged said instrument to be the free act and deed of said Corporation.

In Witness Whereof, I have hereunto affixed my official signature with the seal of my office the day and year above written.

(Seal) (Signed) Grace D. Horton
Notary Public, San Diego County, Calif.

My Commission expires Feb. 5, 1946 [103]

EXHIBIT 2

Contract No. MCc-1879.

This Agreement, entered into this 27th day of November, 1941, by and between the United States Maritime Commission (hereinafter called the "Commission") and Tavares Construction Company, Inc., a corporation organized and existing under the laws of the State of California, Lloyd S. Stroud and R. S. Seabrook, individually and as the partnership of Stroud and Seabrook, and C. M. Elliott, said corporation and persons being joint ventures doing business under the name of Concrete Ship Constructors and being hereinafter referred to as the "Contractor":

Whereas:

1. Under the provisions of Public Law 247 (77th Congress) approved August 25, 1941, the Commission is authorized to construct in the United States, merchant vessels of such type, size and speed as it may determine to be useful for carrying on the commerce of the United States and suitable for the conversion into naval or military auxiliaries and to produce and procure parts, equipment, material and supplies for such vessels, without advertising or competitive bidding;

2. The Commission has determined that the vessel hereinafter described is of a type, size and speed which will be useful for carrying on the commerce of the United States and suitable for conversion into naval or military auxiliaries, and desires the contractor to construct said vessel;

3. The aforementioned individuals, partnership and corporation warrant and represent that they are, and each of them is, authorized and has full power to undertake the obligations hereinafter set forth, and that the stockholders and directors of said corporation have taken all action required by law and by its Certificate of Incorporation and by-laws to authorize its officers to execute, acknowledge and deliver this contract; and

4. The Contractor is willing to construct the vessel hereinafter described upon the terms and conditions and for the consideration hereinafter set forth;

Now, Therefore, the parties hereto agree as follows:

Article 1. General Statement of Work.

(a) The Contractor will furnish all labor, material, supplies and equipment and will perform all work necessary to construct, build and deliver, and will construct, build and deliver at his own risk and expense five concrete barges (herein called the "Vessels") in strict accordance with the plans and specifications referred to in Article 3 hereof, and will do everything required of the Contractor by this contract and the plans and specifications, including the installation of any outfitting or equipment furnished by the Commission, all for the consideration hereinafter stated.

(b) The Vessels shall be constructed at the Contractor's shipyard to be located at National City, California (herein called the "Shipyard") and each Vessel when completed, and after passing the tests prescribed in the specifications in a manner satisfactory to the Commission shall be delivered to the Commission alongside of a safe and accessible pier at or near the Shipyard where there shall

be sufficient water for the Vessels always to be afloat, custom to the contrary notwithstanding, free and clear of all liens and claims of every nature or at such other place as may be mutually agreed upon.

Article 2. Additional Facilities. The Contractor hereby agrees to acquire within the shortest time possible such shipyard facilities at National City, California as are necessary for the performance of the work under this contract, and for such purposes will enter into an agreement satisfactory in form and substance to the Commission with the Defense Plant Corporation for the financing of [104] the cost of such additional facilities. In addition to the payments provided for in Article 15 hereof, the Commission will reimburse the Contractor for any and all rental payments made during the term of this contract to Defense Plant Corporation pursuant to the terms of the aforementioned agreement with such Corporation, but in no event shall the obligation of the Commission to make payments hereunder exceed the sum of \$404,500, plus an amount equal to interest and other charges reimbursable to Defense Plant Corporation under the terms of the aforementioned agreement.

Article 3. Plans and Specifications; Interpretation and Changes.

(a) The drawings or plans, and specifications (herein called the "plans and specifications") designated "United States Maritime Commission Plans and Specifications dated November 13, 1941" for the construction of the Vessels have, at or before the execution of this contract, been identified by the signatures of the parties hereto and are hereby made a part hereof with the same force and effect as though herein set out in full.

(b) If any discrepancy, difference, or conflict exists between the provisions of this agreement and the plans and specifications, then, to the extent of such discrepancy, difference or conflict only, the plans and specifications shall be ineffectual and the provisions hereof shall prevail; but in all other respects the plans and specifications shall be in full force and effect. Any question whether the plans and specifications are in conflict with the provisions of this instrument and any conflict or discrepancy between the plans and specifications themselves shall be brought to the attention of the Commission; in such cases specific directions will be given in writing by the Commission to the Contractor and compliance by the Contractor with such directions shall be obligatory.

(c) The Contractor shall not (except as provided in subsection (b)) depart from the requirements of the plans or specifications without prior written approval of the Commission. The Contractor shall; in making application to the Commission for changes in the plans or specifications, set forth clearly the reasons for the advantages of such changes. The right is reserved, however, by the Commission to make any deductions from, additions to, or further developments of the plans and specifications within the general scope thereof.

Article 4. Contract Price. The contract price of all the Vessels shall be the sum of \$2,494,430 (based on \$498,486 per Vessel) together with such additions and subject to such deductions as are hereinafter provided.

Article 5. Adjustments of Price for Change in Plans and Specifications. Within 10 days (or such longer period as the Commission may allow) after receipt of direction from the Commission to make changes in the plans or specifications of any of the Vessels, or of approval by the Commission of changes requested by the Contractor, the Contractor will furnish to the Commission in writing a statement of its estimate of the net increase or net decrease in cost to result from such change. The Commission (or a Board or Committee designated by it to act in its behalf) shall consider the statement so submitted by the Contractor and on the basis thereof and of such other material as it may deem relevant shall determine and furnish to the Contractor the amount of any such net increase or net decrease in cost. In the event of a net increase, the amount thereof plus 10 per cent shall be added to the contract price. In the event of a net decrease, the amount thereof shall be deducted from the contract price.

Article 6. Adjustments in Contract Price.

(a) The contract price of the Vessels to be constructed and delivered hereunder as stated in Article 4, as adjusted from time to time, is subject to increase or decrease for increased or decreased labor and material cost determined as follows: [105]

1. Labor.

A. The portion of the contract price represented by labor is accepted (for the purposes of this Article only) as \$747,729, divided into labor cost quotas for each month of the construction period as follows:

Months after
December 1,

<u>1941</u>	<u>% Incr.</u>	<u>Amount</u>
1	2.4	\$ 17,946
2	12.4	92,718
3	15.4	115,150
4	18.1	135,339
5	16.5	123,375
6	13.7	102,439
7	11.0	82,250
8	8.0	59,818
9	2.3	17,198
10	0.2	1,496

B. The Commission will obtain from the United States Department of Labor, Bureau of Statistics, the average hourly earnings in the Durable Goods Group of Manufacturing Industries for the month of October, 1941. The Commission will similarly obtain such average hourly earnings for each subsequent month of the contract period. The Commission shall determine to the nearest 1/10th of 1 per cent the percentage, if any, by which such average hourly earnings for the monthly period are greater or less than the average hourly earnings for the month of October, 1941. The percentage of increase or decrease so determined will be applied to the quota above stated for such monthly period, and the contract price will be correspondingly increased or decreased.

2. Materials.

A. The portion of the contract price represented by material is accepted (for the purposes of this Article only) as \$1,121,594, divided into material cost quotas for each quarterly period of the construction of such Vessels as follows:

<u>Quarters after December 1, 1941</u>	<u>% Incr.</u>	<u>Amount</u>
1st (3 mo.)	37.8	\$423,963
2nd (3 mo.)	53.7	602,296
3rd (3 mo.)	8.4	94,214
4th (1/3 mo.)	0.1	1,121

B. The Commission will obtain from the United States Department of Labor, Bureau of Statistics, the index number of wholesale prices for Group VII, building materials, for the month of October, 1941. The Commission will similarly obtain such index number for each subsequent month of the contract period. The average of the index numbers so obtained for the months included in each quarterly period shall be taken as the index number for such period. The Commission shall determine to the nearest 1/10th of 1 per cent the percentage, if any, by which such average index number for the quarterly period is greater or less than [106] the index number for the month of October, 1941. The percentage of increase or decrease so determined will be applied to the stated quota for the quarterly period, and the contract price will be increased or decreased by the resulting amount.

(b) In the event that during the progress of the work hereunder the Commission shall determine that the quotas set forth above do not adequately reflect the relative percentage of labor and material expenditures made by the Contractor during the quota months or quota periods of the construction of the Vessels, adjustments will be made in such quotas. The quotas of labor and materials will not be altered on account of delays in the completion of the Vessels unless extension in contract time is authorized by the Commission, in which case revised quotas as determined by the Commission will be used.

(c) The Commission reserves the right to substitute for the method of adjustment set forth in paragraph (a) any other method satisfactory to the Contractor should it at any time in the judgment of the Commission appear that the specified methods do not reflect equitably the increase in cost of material and labor under the contract.

(d) The contract price as adjusted under Article 5 and paragraph (a) of this Article shall be subject to further adjustment as follows:

(1) In the event that the amounts which have been properly paid or which are payable to the Contractor under the provisions of paragraph (a) and (c) of Article 15 shall exceed the contract price stated in Article 4 as adjusted under the provisions of Article 5 and paragraph (a) of this Article, the contract price shall be further adjusted so that it shall equal said amounts paid or payable to the Contractor under the provisions of said paragraphs (a) and (c) as determined by audit.

(2) In the event that the contract price stated in Article 4 as adjusted under the provisions of Article

5 and paragraph (a) of this Article shall exceed the amounts which have been properly paid or are then payable to the Contractor under paragraphs (a) and (c) of Article 15, the contract price shall be decreased by such amount as will cause it to equal said amounts paid or payable under said paragraphs (a) and (c) of said Article 15 plus those payable under paragraph (d) of such Article.

Article 7. Delivery Dates. The work under this contract shall be commenced within five days of the date hereof, and each of the Vessels shall be completed in accordance with the following schedule:

<u>Commission's</u> <u>Hull</u> <u>Number</u>	<u>Contractor's</u> <u>Hull</u> <u>Number</u>	<u>Delivery Date</u>
634	1	April 16, 1942
635	2	May 16, 1942
636	3	July 15, 1942
637	4	August 14, 1942
638	5	October 13, 1942 [107]

Article 8. Extension of Time for Completion.

(a) Within 10 days after receipt or direction from the Commission to make changes in the plans and specifications, or approval by the Commission of changes requested by the Contractor, the Contractor will furnish to the Commission in writing a statement of its estimate of the probable resulting change in the time for completion of the work on any Vessel or Vessels affected by such change. The Commission (or a board or committee designated by it to act in its behalf) shall consider the statement so sub-

mitted by the Contractor and on the basis thereof and of such other material as it may deem relevant, shall furnish to the Contractor an estimate of such resulting change, and the date for the completion of the Vessels affected shall be correspondingly changed. If it is later established to the satisfaction of the Contractor and the Commission that the actual change in time resulting from such changes varies from such estimate, the change shall be adjusted.

(b) In case of any delay caused by the Commission or any other agency or instrumentality of the United States, or in case of the occurrence of any cause of delay beyond the reasonable control of the Contractor, including without limitation, non-delivery or late delivery of materials and equipment (but only if the Contractor has ordered such material and equipment at proper times and used every reasonable effort to obtain delivery thereof at the times required), Government priorities, acts of God (other than ordinary storms or inclement weather conditions), earthquakes, lightning, floods or fire, strikes, riots, insurrection or war, or delays of subcontractors due to such enumerated causes, written notice thereof and the anticipated results thereof shall be given promptly by the Contractor to the Commission. Within 20 days after such cause of delay has ceased to exist, the Contractor shall file with the Commission a statement of the actual delay resulting from such cause. The Commission (or a Board or Committee designated by it to act in its behalf) shall determine the duration of such delay, and the time for completion of the Vessel or Vessels, the delivery of which has been delayed thereby, shall be correspondingly extended.

(c) Without prejudice to the Contractor's rights, the determination of any and all claims for change in the

time for completion of any Vessel shall, at the request of either the Commission or the Contractor, be postponed until the completion of such Vessel.

Article 9. Liquidated Damages or Bonuses for Early or Late Completion. In case the Contractor shall fail to complete and deliver any Vessel within the time herein prescribed (as extended under the provisions of the preceding Article) there shall be deducted as liquidated damages from the amount payable to the Contractor under the provisions of paragraph (d) of Article 15 hereof the sum of \$50.00 for each calendar day or part thereof during which the delivery of each Vessel is so delayed. In the event that the Contractor shall, however, complete any Vessel prior to the time prescribed for such completion, there shall be paid as bonus to the Contractor, in addition to the other payments specified in this contract, the sum of \$50.00 for each calendar day elapsing from the date on which the Vessel is actually delivered to the date prescribed for such delivery. The total amount of liquidated damages payable hereunder shall be limited to the amount which would otherwise be payable to the Contractor under the provisions of paragraph (d) of Article 15, and bonus payments shall be subject to the limitations set forth in said paragraph (d).

Article 10. Contractor to Receive and Care for Items Furnished by Commission. The Contractor shall receive, inspect, check as to agreement with bill of lading, store, insure, protect, and install aboard the Vessels prior to delivery, all or any of the items required by the specifications or [108] otherwise to be furnished by the Commission.

Article 11. Materials and Workmanship—Domestic Preference. In the performance of the work covered by this contract, the Contractor, subcontractors, material men, or suppliers shall use only such unmanufactured articles, materials, and supplies, as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced or manufactured, as the case may be, in the United States; the foregoing provisions shall not apply to such articles, materials, or supplies of the class or kind to be used or such articles, materials, or supplies from which they are manufactured as are not mined, produced, or manufactured, as the case may be, in the United States in sufficient and reasonable available commercial quantities and of a satisfactory quality, or to such articles, materials, or supplies as may be excepted by the head of the Department under the proviso of Title III, Section 3, of the Act of Congress approved March 3, 1933 (41 U. S. C. 10).

Article 12. Inspection—Approval of Plans.

(a) All material and workmanship shall be subject to inspection, by inspectors of the Commission or such other representatives as the Commission may designate at any and all proper times during manufacture or construction at any and all places where such manufacture or construction is carried on.

(b) The Contractor shall furnish promptly all reasonable facilities and materials including suitable furnished offices with light, heat, telephone, desks, drawing tables, and filing cabinets, necessary for safe and convenient in-

spection and any test that may be required by the inspectors.

(c) Working plans shall be submitted to the Commission in accordance with such procedure as it may prescribe and blueprints of such plans shall be furnished when required by the Commission. The Commission shall promptly pass on all plans and requisitions submitted for action.

(d) The Commission shall promptly pass all work and material conforming to the requirements of this contract, and shall promptly reject all work and material not conforming to the requirements of this contract. Rejected workmanship shall be satisfactorily corrected, and rejected material shall be satisfactorily replaced with proper material, and the Contractor shall promptly segregate and remove the rejected material.

(e) All inspection and tests by the Commission shall be performed in such manner as not to unnecessarily delay the work. The Contractor shall be charged with any additional costs of inspection when material and workmanship are not ready at the time inspection is requested by the Contractor.

(f) Any dispute between the Contractor and any representative of the Commission under this Article, shall be referred promptly to the Commission, and the decision of the Commission thereon shall be final and conclusive.

(g) The provisions of this Article are subject to the provisions of this contract relative to the trials and acceptance of the Vessels.

Article 13. Test and Acceptance. When each barge is completed and after the Commission has made such tests thereon as it may prescribe, such barge, if it meets

with the requirements of the plans and specifications and this contract, will be accepted by the Commission subject to the provisions of Article 14.

Article 14 Guarantee Period. If at any time within 6 months after the acceptance of each Vessel any weakness, deficiency, defect, failure, breaking down or deterioration in such Vessel, including her machinery, appurtenances, [109] and equipment, other than that due to wear and tear, or the negligence or other improper act or omission of the Commission or other operator thereof shall appear, the Contractor will be required to make good, at its expense, any such defects to the satisfaction of the Commission. Any such work required to be done is to be carried out at a port agreeable to the Commission. In computing said period of 6 months from date of acceptance, the time, if any, but only such time, during which the Vessel is not available for service on account of any weakness, deficiency, defect, failure, breaking down or deterioration of the Vessel for which the Contractor is responsible, shall be excluded.

The Contractor shall be informed of all defects and deficiencies discovered during said guarantee period for which it is held responsible, and, whenever practicable, shall be given an opportunity to inspect the same before the defects and deficiencies are remedied, and the decision of the Commission as to the responsibility of the Contractor for such defects and deficiencies shall be final and binding on the parties to this contract.

No payments made under the provisions of this Article shall be included in the cost of the Vessels for the purpose of making payments under the provisions of Article 15 hereof or otherwise, and the total liability of the Con-

tractor under this Article shall be limited to the amount of payments which are payable or have been paid to the Contractor under the provisions of paragraphs (c) and (d) of said Article 15.

Article 15. Payment of Contract Price.

(a) Partial payments on account of the contract price shall be made during the progress of the work hereunder to the Contractor by the Commission at semi-monthly or such other intervals as the parties may mutually agree upon. Such partial payments shall be based upon that portion of the value of the work done and materials on hand which is represented by the cost thereof (inclusive of overhead), and the Contractor shall accompany each voucher for such partial payment with a statement in form satisfactory to the Commission setting forth such cost. Any payment made on the basis of such voucher shall be subject to adjustment upon final audit by the Commission. The Commission may, upon such terms and conditions as it may prescribe, include, as part of the value of work and materials, work performed by any subcontractor or materials, machinery or equipment to be installed in the Vessels, although not yet delivered, if title to such materials, machinery or equipment shall have vested in the Commission.

(b) No payments shall be made except on bills, vouchers, or invoices in such number and form and executed and attested in such manner and supported by such evidence as shall be prescribed by the Commission. All warrants for payments hereunder shall be made payable to the Contractor or order.

(c) Upon launching of each Vessel, there shall be paid to the Contractor, in addition to the payments provided

for in paragraph (a) hereof, the sum of \$6,797.50, and upon delivery thereof the sum of \$6,797.50.

(d) In the event that the payments made under paragraphs (a) and (c) hereof shall, upon completion and delivery of all the Vessels and a final audit under this contract, be found to be less than the contract price stated in Article 4 and adjusted under the provisions of Article 5 and paragraph (a) of Article 6, the Commission shall pay to the Contractor an amount equal to (i) 50 percent of the sum by which the contract price, adjusted as aforesaid, exceeds the amount paid under the provisions of paragraph (a) and (c), less (ii) any liquidated damages payable under Article 9 hereof, plus (iii) any bonuses payable under said Article 9; Provided, that in no event shall the total amount payable under the provisions of this paragraph (including bonuses payable under the provisions of Article 9 hereof) excess the sum of \$158,586. [110]

(e) The payments specified in the preceding paragraphs of this Article shall constitute full consideration to the Contractor for all the work to be performed under the provisions of this contract.

Article 16. Determination of Cost.

(a) For the purposes of making payments under Article 15 hereof the term "cost" as therein used shall include all amounts which the Commission determines are chargeable directly to the construction, outfitting and equipping of the Vessels or to constitute items of overhead expense which are not directly chargeable thereto but are incident and necessary for the work of constructing, outfitting and equipping the Vessels. Such cost shall be determined by the Commission in accordance with the applicable provisions of its "Regulations Prescribing the Method for De-

termining Profit, Adopted May 4, 1939," it being understood and agreed that there shall be included in such costs overhead and depreciation on any equipment or plant furnished by the Contractor for use in connection with the work hereunder and the cost of expendable tools and supplies consumed in accordance with and to the extent permitted by the provisions of said Regulations.

(b) In determining cost for the purpose of Article 15 hereof the Commission will exclude therefrom (1) any expense, including (without limitation) traveling expense, deemed by the Commission to be excessive, (2) the cost of remedying work and replacing materials which are defective because of the failure of the Contractor to use reasonable diligence and the cost of performing any work required under the provisions of Article 14 hereof, (3) the exclusions required under paragraph 7.23 of said "Regulations Prescribing the Method of Determining Profit, Adopted May 4, 1939," and (4) costs incurred by the Contractor in contravention of the provisions of this contract including those of Article 17.

(c) All costs shall be scrutinized by the Commission to determine that they are fair, just and not in excess of the market price for the materials and services for which they are incurred.

(d) Statement returns relative to expenditures shall be made as and when directed by the Commission, and all books, files and other records in respect thereto shall at all times be open for inspection by representatives of the Commission.

Article 17. Purchases, Subcontracts and Wage Rates.

(a) Wherever practicable, the Contractor shall obtain from responsible firms and individuals competitive bids for the material, equipment and services required in connection with the performance of the work under this contract and shall award orders therefor to the lowest satisfactory bidder. Where, however, such procedure is not practicable or expedient, contracts may be made and orders awarded upon the basis of market or negotiated prices. No order shall, however, be placed or subcontract made which calls for the performance of services or the delivery of materials, equipment and machinery at a price in excess of \$10,000 per Vessel without the prior approval of the Commission or its authorized representative.

(b) Subject to applicable laws and regulations of any agency of the United States issued pursuant to such laws, the rate of wages paid by the Contractor for work performed under this contract shall not, without the consent of the Commission, be in excess of those established by any stabilization or other conference held under the auspices of the National Defense Advisory Commission or other agency of the United States for the region in which the Shipyard is located, or in the event that rates have not been established for such region, in excess of those which may be approved from time to time by the Commission. [111]

Article 18. Title. The title to all materials, equipment, supplies, and all other property assembled at the Shipyard or elsewhere for the purpose of being used for the construction of the Vessels, as well as title to the Vessels themselves, on account of which payments are made shall immediately be vested in the Commission: Provided, how-

ever, that nothing herein contained shall be construed as a waiver by the Commission of its right to require the Contractor to replace, at Contractor's expense, unsatisfactory workmanship or materials as herein provided: Provided further, that the Contractor shall have an equity in any such material, equipment, supplies, and other property to the extent that it may not have been fully paid for by the Commission.

Article 19. Taxes. The Contractor shall pay all United States, State, County, and City or other taxes, assessments or duties lawfully assessed against the Vessels, materials, supplies or equipment to be used under this contract prior to delivery thereof to the Commission.

Article 20. Liens.

(a) When payment is to be made under this contract, as a condition precedent thereto, the Commission may, in its discretion, require that evidence satisfactory to it, to be furnished by the Contractor showing what, if any, liens or rights in rem of any kind against the Vessels, or their machinery, fittings, or equipment, or the materials on hand for use in the construction thereof, have been or can be acquired for or on account of any work done, or any machinery, fittings, equipment, or material already incorporated as a part of said Vessels, or on hand for that purpose; but it is hereby further stipulated, covenanted, and agreed by the Contractor, for itself and on its own account and for and on account of all persons, firms, associations, and corporations furnishing labor and material for the Vessels, and this contract is upon the express condition that no liens or rights in rem of any kind shall lie or attach upon or against the Vessels or their machinery, fittings, or equipment, or the materials

therefor, or any part thereof, or of either, for or on account of any work done upon or about said Vessels, machinery, fittings, equipment, or materials, or of any materials furnished therefor or in connection therewith, nor for or on account of any other cause, or thing, or of any claims or demands of any kind, except the claims of the Commission.

(b) If a lien or encumbrance arising out of the work to be performed hereunder is filed against the Vessels, or any of them, or against any materials, equipment, supplies or other property intended therefor, the Contractor shall forthwith notify the Commission thereof, and the Commission, subject to the provisions of this Article, may satisfy the same and withhold the amount thereof, together with any expenses incurred in connection therewith from the amount of any payment or payments which may then be due or which may thereafter become due to the Contractor. If the amount of any such payments is insufficient to permit the deduction of the entire cost and expense so incurred by the Commission, the Contractor shall, nevertheless, be liable to the Commission for the deficiency and will pay the same to the Commission on demand. In the event the Commission does not satisfy any such lien or encumbrance, it may, nevertheless, withhold the amount thereof, as provided above, unless and until such lien or encumbrance is satisfied by the Contractor.

(c) If a lien or encumbrance arising out of the work to be performed hereunder is filed against the Vessels, or any of them, or the materials, equipment, supplies, or other property intended therefor, the Contractor shall within 15 days thereafter, cause the Vessel or Vessels, materials, equipment, supplies or other property to be

released and any lien on them or any of them to be discharged; nothing contained herein, however, shall be construed as preventing the Contractor from contesting any such lien or encumbrance or the debt to which it may relate, but in the event of any such contest it shall be the duty of the Contractor within the time named to procure by court order a release of the property from the lien or encumbrance by the filing of a bond, [112] or otherwise, if any such remedy is available under the law; and in the event it is not, the Contractor shall then immediately take such steps as in the opinion of the Commission shall prevent such lien or encumbrance from delaying the work, and shall indemnify and save harmless the Commission from all costs, charges, and damages incurred, or possible of being incurred, by reason of such contest or in any way attributable thereto.

Article 21. Insurance on Vessels and Materials. Until each Vessel has been completed, physically delivered, and accepted by the Commission, such Vessel and all materials, outfitting, equipment, and appliances to be installed in the Vessels including all materials, outfitting, equipment and appliances provided by the Commission for and used or to be used in the construction thereof shall be kept fully insured under Builder's Risk form of policies or other usual forms of insurance including loss or damage caused by strikers, locked out workmen, and/or persons taking part in labor disturbances, and/or riot or civil commotion and/or malicious damage and/or sabotage and/or vandalism and such other forms of insurance as the Commission may require in an amount at no time less than the aggregate of amounts paid or payable to the Contractor by the Commission under this agreement plus the value of any materials, outfitting, equipment, and appliances

furnished by the Commission. The amount of insurance, the terms of the policies, and the insurance companies, underwriters, or underwriting funds shall at all times be satisfactory to the Commission. All policies of insurance shall be taken out in the name of the Contractor for account of Whom It May Concern, and losses under such policies shall be made payable to the Commission for distribution by it to the Commission, or the Contractor as their respective interests may appear. All cover notes and policies, with all premiums or other charges prepaid, shall be delivered to the Commission for its approval and custody. Policies if not in conformance herewith shall be surrendered and cancelled upon direction of the Commission and new policies procured in conformance herewith.

The Contractor may, in its discretion, and shall, if and as required by the Commission, secure fidelity and other similar bonds, workmen's compensation, public liability and automobile liability insurance and such other insurance as may be required by the laws of the state in which the Shipyard is located. The Contractor may also obtain other insurance against liabilities of the Contractor to any third person for any cause whatsoever. All insurance required pursuant to instruction of the Commission shall at all times be maintained with companies, underwriters, or underwriting funds, in amounts and under forms of policies, satisfactory to the Commission.

The Contractor shall not be deemed to have warranted the validity or coverage of any such insurance. In the event that any of the insurance required by the Commission hereunder by reason of any act, omission, or negligence of the Contractor shall not be kept in full force and effect, the Contractor shall pay to the Commission all

losses and indemnify the Commission against all claims and demands which would otherwise have been covered by such insurance.

Article 22. Injury to Employees. The Contractor shall indemnify and save harmless the United States, the Commission, and any other agency or instrumentality of the United States, and the Vessels, against all claims arising from injury to or death of employees, workmen, trespassers, licensees, and all other persons, whether in, on, or about the work to be performed hereunder or from damage to or loss of property, due to the act, neglect or default of the Contractor or subcontractors or their agents or employees; it being expressly understood that the workmen engaged upon the work on the Vessels to be constructed hereunder shall at all times be employees of the Contractor or subcontractors and not of the Commission.

Article 23. Patent Infringement. The Contractor shall be responsible for any and all claims made against the Commission or the Vessels for infringement of patents or patent rights or for the use of patented articles in connection with the work and material furnished by the Contractor, and shall [113] defend, save harmless, and indemnify the United States, the Commission, and every agency or instrumentality of the United States, and the Vessels against all such claims and against all costs, expenses, charges, and damages which the said parties or any of them, may be obliged to pay by reason thereof, including expenses of litigation, if any; provided, however, that upon any such claim being made against said parties or any thereof, the Contractor will be promptly notified of such claim and also of any suit brought in connection

therewith and will be given an opportunity to defend the same; and provided, that no payment on account of any such claim shall be made by the said United States, the Commission, or any other agency or instrumentality of the United States, unless either with the consent of the Contractor or pursuant to the decree of a proper court or tribunal.

Article 24. Covenant to Make Prompt Payment. The Contractor covenants that it will have and maintain at all times, sufficient working funds for the carrying out of its obligations hereunder, and will make prompt payment for all labor, materials, services, and other charges which are to be paid under this contract.

Article 25. Labor Laws.

(a) The Contractor shall not employ any person undergoing sentence of imprisonment at hard labor.

(b) The Contractor will report monthly, and will cause all subcontractors to report in like manner, within 5 days after the close of each calendar month on forms to be furnished by the United States Department of Labor, the number of persons on their respective pay rolls, the aggregate amount of such pay rolls, the man-hours worked, and the total expenditures for materials. He shall furnish to the Department of Labor the names and addresses of all subcontractors on the work at the earliest date practicable: Provided, however, That the requirements of this paragraph shall be applicable only for work at the site of the construction project.

(c) The Contractor and subcontractors at the site of the construction project will comply with the provisions of Public Act No. 324, 73rd Congress, approved June 13, 1934, (48 Stat. 948) and with the provisions of the regu-

lations issued by the Secretary of Labor thereunder, entitled "Regulations Applicable to Contractors and Sub-contractors on Public Building and Public Work and on Building and Work Financed in Whole or in Part by Loans or Grants from the United States," published in the Federal Register March 1, 1941.

(d) This contract is subject to the provisions of the Act of June 25, 1936, (Public No. 814), entitled "An Act to provide more adequate protection to workmen and laborers on projects, buildings, constructions, improvements, and property wherever situated, belonging to the United States of America, by granting to the several States jurisdiction and authority to apply their State workmen's compensation laws on all property and premises belonging to the United States of America."

Article 26. Eight-Hour Law. Until otherwise provided by law, provisions of law prohibiting more than 8 hours of labor in any one day of persons engaged upon work covered by this contract shall, in accordance with the provisions of the Act approved October 10, 1940 (Public No. 831, 76th Cong.), be suspended. The provisions of said Act approved October 10, 1940 are applicable to this contract.

Article 27. Prohibition Against Employment of Certain Persons and Against Discrimination. The Contractor shall not employ any person who advocates, or who is a member of an organization that advocates, the overthrow of the Government of the United States by force or violence to perform any part of the work under this contract, and as a condition to the employment of any person for the performance of such work, the Contractor shall, if the Commission so directs, require such person

to execute and to file an affidavit in such form as to satisfy the requirements of Section 4 of Public Law No. 23 (77th Congress), [114] approved March 27, 1941, but the execution and filing of such affidavit shall be without prejudice to the right of the Commission to require such further evidence in the premises as it may deem desirable. The Contractor agrees that in the performance of the work under this contract, it will not discriminate against any worker because of race, creed, color or national origin. (Executive Order No. 8802, approved June 25, 1941.)

Article 28. Contingent Fees. The Contractor warrants that he has not employed any person to solicit or secure this contract upon any agreement for a commission, percentage, brokerage, or fee, contingent or otherwise. Breach of this warranty shall give the Commission the right to terminate the contract, or, in its discretion, to deduct from the contract price or consideration the amount of such commission, percentage, brokerage, or fees. This warranty shall not apply to commissions payable by contractors upon contracts or sales secured or made through bona fide established commercial or selling agencies maintained by the Contractor for the purpose of securing business.

Article 29. Officials not to Benefit. No member of or delegate to Congress, nor Resident Commissioner, shall be admitted to any share or part of this contract or to any benefit that may arise therefrom, except as provided in Section 116 of the Act approved March 4, 1909, (35 Stats. 1109).

Article 30. Events of Default. The following shall constitute events of default under this contract:

(a) Failure of the Contractor in any respect to use due diligence in proceeding with the performance of the work required under this contract, or failure to perform any of the covenants on its part to be performed hereunder, provided that the Commission in either instance shall give notice to the Contractor as to such failure and Contractor shall not within thirty days after being so notified cure such failure.

(b) The filing by the Contractor or any of the undersigned individuals or the undersigned partnership or corporation of a petition in bankruptcy or for reorganization under the Bankruptcy Act or the entry of an order upon petition against the Contractor or any of the said individuals or said partnership or corporation adjudicating such Contractor, individuals, partnership or corporation or any of them a bankrupt, or the appointment of a receiver or receivers of the Contractor, said individuals, partnership or corporation or any of them or of any property belonging to the Contractor, said individuals, partnership or corporation necessary for the performance of its obligations under this agreement.

Article 31. Termination on Account of Default.

(a) Under the occurrence of any of the events of default set forth in Article 30 hereof the Commission may terminate this contract and enter upon the shipyard of the Contractor and take possession thereof as well as of any Vessels either completed or uncompleted and any machinery, materials, fittings, equipment and supplies

theretofore or thereafter delivered at the Shipyard to be incorporated in the construction or the equipment of the Vessels, or to be used in connection therewith, together with all plans, specification, calculations and other records required for the construction or equipment of the Vessels. In the event of termination pursuant to the provisions of this Article, the Commission may complete, or cause to be completed, all of the work to be performed upon the Vessels hereunder, and for such purpose, may take possession of so much of the Shipyard and the Contractor's plant, equipment, tools, machinery and appliances as may be necessary for the proper conduct of such work, and use and occupy the same without payment of rental or any other charge therefor until all of the work to be performed upon the Vessels has been completed. [115]

In the event that this contract is terminated pursuant to the provisions of this Article, the Contractor shall not be entitled to receive any further payments from the Commission on account of the contract price with the exception of payments which have accrued under the provisions of paragraphs (a) and (c) of Article 15 prior to date of termination.

Article 32. Optional Cancellation by the Commission.

(a) At any time prior to the completion of the work to be performed hereunder, the Commission may cancel this contract upon written or telegraphic notice to the Contractor, and upon the effective date of such cancellation the Contractor shall stop all work hereunder except

as otherwise directed by the Commission. In the event of cancellation under this Article, the Commission shall pay to the Contractor the following amounts:

(1) The cost of work performed and materials, equipment and machinery acquired for use in any Vessel whether or not completed and delivered other than costs which have been previously paid under the provisions of paragraph (a) of Article 15 of this contract.

(2) An amount equal to 10 percent of the cost of said work, materials, equipment and machinery or 6 percent of the contract price (as adjusted under the provisions of Article 5 and paragraph (a) of Article 6 to date of cancellation) multiplied by the percentage of the completion of the contract work, whichever amount shall be the lesser, less any payments previously made to the Contractor under the provisions of paragraphs (c) and (d) of Article 15 hereof.

(3) An amount equal to the cancellation fees, approved by the Commission, or charges paid by the Contractor in connection with the cancellation of any subcontract or other agreement for materials, machinery or equipment to be used or services to be performed in connection with the construction of the Vessels if the Commission shall have permitted the cancellation of such subcontracts or other agreements.

(4) Any other expenses of the Contractor in connection with the cancellation of this contract which are determined by the Commission to be necessary and reasonable.

(b) If this contract is cancelled pursuant to the provisions of this Article, the Commission shall permit the Contractor to cancel all subcontracts or other agreements theretofore entered into by the Contractor for the materials, machinery or equipment to be used or services to be performed in connection with the construction of the Vessels except in those cases where the continued performance of such subcontract or other agreements is necessary for the completion of work which the Commission directs the Contractor to perform or where the Commission offers to take over and perform the Contractor's obligations under such subcontracts or other agreements.

Article 33. Loss of or Damage to Vessels. If there shall be an actual loss of any Vessel prior to its delivery to the Commission, or if any Vessel shall be so damaged that in the determination of the Commission work thereon should be abandoned, the Commission may, at its option, either require the Contractor to construct another vessel as a replacement for the Vessel so lost or destroyed or modify this contract so as to relieve the Contractor of its obligation to deliver the Vessel so lost or damaged. In either case, payments made under the provisions of paragraphs (a) and (c) of Article 15 hereof on account of the Vessel so lost or damaged shall be disregarded in determining the amount of payment to which the Contractor is entitled under the provisions of paragraph (d) of said Article 15. In the event that the Commission requires the Contractor to construct a replacement vessel as aforesaid, no adjustment [116] will be made in the contract price on account of such replacement. In the event however, that the Contractor is, pursuant to the provisions of this Article, relieved of its obligations to

deliver any Vessel, the contract price stated in Article 4 shall be reduced by an amount equal to such price divided by the number of Vessels to be constructed hereunder, and the maximum amount payable under the provisions of paragraph (d) of Article 15 shall be reduced in the same proportion.

Article 34. Arbitration. Notwithstanding any other provisions to the contrary, in any case where this agreement provides that determination by the Commission of a question of fact shall be final or conclusive, the Contractor may, within 10 days after the making of such determination, give notice to the Commission of its appeal therefrom. Questions of fact with respect to which an appeal is so taken shall be referred to arbitrators, the Commission and the Contractor each designating one and the two thus appointed, in case of disagreement, designating a third as umpire. The arbitrators shall give prompt notice to both parties of their determination of such questions of fact, which shall thereupon supersede the determinations of the Commission and shall be binding upon the Commission and the Contractor.

Article 35. Effect of this Contract. Said Travares Construction Company, Inc. and the partnership of Stroud and Seabrook, as well as the members of such partnership, and C. M. Elliott shall be jointly and severally bound hereunder and all of said individuals and said corporation and said partnership shall be bound by the acts or representations of any one of said individuals, said corporation, said partnership or the members thereof, and payment by the Commission to any one shall constitute payment to all of them. Wherever reference is made herein to the "Contractor" it shall mean said individuals, said

partnership, the members of said partnership and said corporation, both as individuals and as joint venturers.

In Witness whereof, the parties hereto have executed this agreement as of the day and year first above written.
(Seal)

UNITED STATES MARITIME COMMISSION

By: E. S. LAND

Chairman

Attest:

W. C. PEET, JR.

Secretary

(Seal)

TAVARES CONSTRUCTION COMPANY, INC.

By: HENRY M. PAGE

Vice President

Attest:

DON F. GATES

Secretary

STROUD AND SEABROOK

By: LLOYD S. STROUD

Lloyd S. Stroud

(Individually and as a partner)

By: R. S. SEABROOK

R. S. Seabrook

(Individually and as a partner)

C. M. ELLIOTT

C. M. ELLIOTT

Approved as to form:

WADE H. SKINNER

Assistant General Counsel

U. S. Maritime Commission [117]

EXHIBIT 3

TIDELANDS LEASE

This Indenture of Lease made and entered into this 1st day of January, 1942, by and between City of National City, hereinafter referred to as the "City," and the Tavares Construction Company, Incorporated, a California Corporation, hereinafter referred to as the "Corporation";

Witnesseth, as follows:

That said City, under and by virtue of the laws of the State of California, has jurisdiction over certain Tidelands in San Diego Bay adjacent to National City, and by this agreement does rent and lease to the Corporation the following described tidelands and subject to the following terms and conditions:

First: The property covered by this lease is described as follows:

Commencing at bulkhead point #302, as established by U. S. Engineer Department; thence S 6° 35' 32" E. 409.09 feet to point of beginning; thence N 83° 24' 28" E. 1379.87 feet; thence S 10° 02' 45" W. 655.58 feet; thence S 83° 24' 28" W. 987.17 feet; thence N 6° 35' 32" W. 76.0 feet; thence S 63° 03' 59" W 218.63 feet; thence N 6° 35' 32" W 628.14 feet to point of beginning.

Said property is delineated upon the blue print attached hereto and made a part hereof, and contains approximately 800,009 square feet.

Second: The term of this lease shall commence on the 1st day of January, 1942, and shall extend for a term of

five years ending December 31, 1946, with the option hereby granted for an additional term of five years, and with a second option for an additional extension of an additional term of five years, and for a third option for an additional extension of an additional five years thereof. In the event of the election of the Corporation to continue such lease for the additional five years continuance in accordance with each of said options, the Corporation shall give notice in writing to said City, thirty days prior to the termination of this lease or extension thereof, by either or all of said options.

Third: The Corporation agrees to pay to the City as rental for the described property the sum of Eight Thousand Dollars (\$8,000.00) per year. Said rentals shall be paid as follows: Four Thousand Dollars (\$4,000.00) upon the execution of this agreement and Four Thousand Dollars (\$4,000.00) on the first of July, 1942; and thereafter semi-annual payments of Four Thousand Dollars (\$4,000.00) each on the 1st day of January and the 1st day of July each and every year thereafter.

Fourth: The Corporation shall have the right to assign the lease or any portion or to sublease any portion of the leased premises. In the event of an assignment of the lease, or any portion thereof or in the event of a sublease, to Defense Plant Corporation or any other department, branch or agency of the United States Government, the Tavares Construction Company, Incorporated shall make all rental payments to the City of National City, notwithstanding such assignment or sublease, and shall also make all payments of taxes with respect to real property used or placed upon the premises by the Defense Plant Corporation or any other department, [118] branch or agency of the United States Government.

Fifth: In the event that the Corporation shall fail to pay to the City the rental sum for said leased premises, when due, the City may terminate this lease agreement without the necessity of a demand or notice to said Corporation. In that event the Corporation shall have sixty (60) days from date of default to remove it's property and equipment. With the exception of pilings and ship basins. The Corporation or its assigns shall have the right after one year to terminate or cancel the lease upon thirty (30) days prior written notice to lessor.

Sixth: The Corporation shall indemnify and keep the City harmless from any claims, costs of judgment proximately resulting from its operations and occupancy under the terms thereof; provided, however, that prompt notice of any such claim as may be filed with the City shall be given to the Corporation and it shall be afforded the timely privilege and option of defending the same.

Seventh: Lessee, its assigns or sublessee shall have the right, subject only to the limitations imposed by law, to construct, erect, affix or maintain upon the leased premises, buildings, structures, improvements, machinery and equipment of any kind or character whatsoever, and it is expressly understood and agreed that as between lessors and lessee, such buildings, structures, improvements, machinery and equipment so constructed, erected, affixed, or maintained, regardless of how the same may be affixed thereto, shall at all times be deemed to be personal property and lessee or its sublessee shall have the right to remove the same, with the exception of pilings and ship basins, at any time during the term of the lease or any extension thereof, or within a period of sixty (60) days

following expiration, cancellation or termination of the lease or any such extension.

Eighth: In event of breach by the Corporation of any of the covenants herein contained, the City may serve notice in writing upon the Corporation that if such breach is not cured within a sixty-day period, the City may declare this lease at an end, and upon such a declaration by the City of its termination of this lease, the said Company shall remove from the said demised premises and have no further right or claim thereto, and the City shall immediately thereupon, without recourse to the Court, have the right to take possession of said premises, and said Corporation shall forfeit all rights and claims thereto and thereunder; provided, however, that in the event of a termination of this lease as in this paragraph provided, the Corporation may within such reasonable time as the City may designate, remove all buildings, structures and equipment and other personal property of the Company, except pilings and ship basins, from the premises herein leased, or otherwise dispose of the same; provided further, that no such termination shall in any wise relieve the Company from the obligation to pay any rentals and charges accrued and unpaid up to the time thereof.

Ninth: Notwithstanding the conditions herein expressed, it is understood and agreed that the City reserves to its Council the right and privilege to annul, change or modify this lease upon the violation of any of the provisions hereof by the lessee, as in its judgment may seem

proper. Reference is hereby made to all existing laws relating to the leasing of tidelands by the City of National City and by such reference all restrictions or conditions imposed and reservation granted are hereby made a part of this lease with the same effect as though expressly set forth herein. [119]

Tenth: Any rights or liabilities acquired by the Maritime Commission under this lease may be terminated by the Maritime Commission after one year from date of execution by giving written notice of said termination to the City, this shall in no wise affect the rights and liabilities of the said Corporation under and by virtue of this lease.

Eleventh: The City hereby grants to the Corporation an option of taking a lease upon the following described premises:

Beginning at bulkhead point #302, as established by U. S. Engineer Department; thence N 77° 00' 39" E. 1487.11 feet; thence S 2° 20' 45" W. 527.48 feet; thence S 10° 02' 45" W. 56.0 feet; thence S 83° 24' 28" W. 1379.87 feet; thence N 6° 35' 32" W. 409.09 feet to point of beginning.

Said property is delineated upon the blue print attached hereto and made a part hereof, and contains approximately 702,811 square feet, for a term of two years at an annual rental of one cent (.01¢) per square foot, said rental payable semi-annually in advance. This option shall be exercisable by notice in writing by the Corpora-

tion to the City at any time within two years from the date hereof.

In Witness Whereof said City of National City has caused this lease to be executed by its Mayor, and to be attested by its Clerk, and said Corporation has caused the same to be executed by its duly authorized officers.

CITY OF NATIONAL CITY

by Frederick J. Thatcher (Sgd.)

Mayor

Dated: February 2, 1942

Attest:

Dale Smith

City Clerk

TAVARES CONSTRUCTION COMPANY, INC.

by (Sgd.)

President

Don F. Gates (Sgd.)

Secretary [120]

ASSIGNMENT OF LEASE

Know All Men By These Presents:

That the undersigned, Tavares Construction Company, Incorporated, a California Corporation, for and in consideration of One Dollar (\$1.00), and other good and valuable consideration, the receipt of which is hereby acknowledged, does hereby assign, transfer and set over to the Defense Plant Corporation, an agency of the United

States Government, all that certain lease dated January 13, 1942, executed by the City of National City, a Municipal Corporation, as grantor, the following described tidelands in San Diego Bay adjacent to said City of National City and more particularly described as:

Commencing at bulkhead point #302, as established by U. S. Engineer Department; thence S 6° 35' 32" E. 409.09 feet to point of beginning; thence N 83° 24' 28" E. 1379.87 feet; thence S 10° 02' 45" W. 655.58 feet; thence S 83° 24' 28" W. 987.17 feet; thence N 6° 35' 32" W. 76.0 feet; thence S 63° 03' 59" W 218.63 feet; thence N 6° 35' 32" W 628.14 feet to point of beginning.

and,

Beginning at bulkhead point #302, as established by U. S. Engineer Department; thence N 77° 00' 39" E. 1487.11 feet; thence S 2° 20' 45" W. 527.48 feet; thence S 10° 02' 45" W. 56.0 feet; thence S 83° 24' 28" W. 1379.87 feet; thence N 6° 35' 32" W. 409.09 feet to point of beginning.

To have and to hold the same from the date hereof for the remainder of said lease.

Dated this 30th day of January, 1942.

TAVARES CONSTRUCTION COMPANY, INC.

by (Sgd.)

President

Don F. Gates (Sgd.)

Secretary [121]

EXHIBIT 4

Contract No. MCc-20,984

This Contract, entered into as of the 26th day of October, 1943, by and between the United States Maritime Commission (herein called the "Commission") and Tavares Construction Company, Inc., a corporation organized and existing under the laws of the State of California, Lloyd S. Stroud and R. S. Seabrook, individually and as a partnership of Stroud and Seabrook, and C. M. Elliott, Carlos Tavares, Henry M. Page, and Don F. Gates, said corporations and persons being joint venturers doing business under the name of Concrete Ship Constructors (herein called the "Contractor");

Whereas:

1. Under the provisions of Public Law No. 5 (77th Congress), approved February 6, 1941, the Commission is authorized to construct, reconstruct, repair, equip and outfit, by contract or otherwise, vessels or parts thereof for any other department or agency of the United States Government to the extent that such department or agency is authorized by law to do so for its own account;

2. The War Department has requested the Commission to have constructed and equipped certain concrete barges of the type referred to in this contract; and

3. The Commission desires the Contractor to construct the aforementioned concrete barges upon the terms and conditions hereinafter set forth.

Now, Therefore, in consideration of the premises and of the mutual promises hereinafter set forth, the parties hereto agree as follows:

Article 1: General Statement of Work. The Contractor will furnish all labor, materials, supplies and equipment, and will perform all work necessary to construct, build and deliver, at its own risk and expense, twenty-five barges (herein called the "Vessels") in strict accordance with the plans and specifications referred to in Article 2 hereof, and will do everything required of the Contractor by this contract and the plans and specifications, including the installation of outfitting and equipment furnished by the Commission, all for the consideration of \$7,600,000 (based on \$304,000 per vessel), herein called the "contract price", together with such additions and subject to such deductions as are herein provided for.

The Vessels shall be constructed at a shipyard (herein called the "Shipyard") owned by Defense Plant Corporation and leased to said Tavares Construction Company, Inc. Subject to the terms and conditions of such lease agreement, the Contractor shall have the right to use such Shipyard for the purpose of performing the work hereunder without the payment of rental or any charge therefor.

The work under this contract shall be commenced within thirty days of the date hereof and each of the Vessels shall be completed in accordance with the following schedule:

<u>Commission's Hull Numbers</u>	<u>Contractor's Hull Numbers</u>	<u>Delivery Dates</u>
2214		January 28, 1944
2215		January 30, 1944
2216		January 31, 1944
2217		February 15, 1944
2218		February 19, 1944
2219		February 23, 1944
2220		February 25, 1944
2221		February 27, 1944
2222		February 29, 1944
2223		March 10, 1944
2224		March 15, 1944
2225		March 20, 1944
2226		March 25, 1944
2227		March 28, 1944
2228		March 31, 1944
2229		April 5, 1944
2230		April 10, 1944
2231		April 15, 1944
2232		April 20, 1944
2233		April 25, 1944
2234		April 30, 1944
2235		May 5, 1944
2236		May 15, 1944
2237		May 22, 1944
2238		May 31, 1944 [122]

Article 2: Plans and Specifications; Interpretation and Changes.

(a) The drawings, plans and specifications (herein called the "plans and specifications") designated "Design B5-BJ1", of the Vessels have, at or before the execution

of this contract, been identified by the signatures of the parties hereto and are hereby made a part hereof with the same force and effect as though herein set out in full.

(b) If any discrepancy, difference, or conflict exists between the provisions of this agreement and the plans and specifications, then, to the extent of such discrepancy, difference or conflict only, the plans and specifications shall be ineffectual and the provisions hereof shall prevail; but in all other respects the plans and specifications shall be in full force and effect. Any question whether the plans and specifications are in conflict with the provisions of this instrument and any conflict or discrepancy between the plans and specifications themselves shall be brought to the attention of the Commission; in such cases specific directions will be given in writing by the Commission to the Contractor and compliance by the Contractor with such directions shall be obligatory.

(c) The Contractor shall not (except as provided in subsection (c)) depart from the requirements of the plans or specifications without prior written approval of the Commission. The Contractor shall, in making application to the Commission for changes in the plans or specifications, set forth clearly the reasons for and advantages of such changes.

Article 3: Adjustments of Price for Change in Plans and Specifications. Within 10 days (or such longer period as the Commission may allow) after receipt of direction from the Commission to make changes in the plans, specifications, or of approval by the Commission of changes requested by the Contractor, the Contractor will furnish to the Commission in writing a statement of its estimate of the net increase or net decrease in cost to result from such change. The Commission (or a Board

or Committee designated by it to act in its behalf) shall consider the statement so submitted by the Contractor and on the basis thereof and of such other material as it may deem relevant shall determine and furnish to the Contractor the amount of any such net increase or net decrease in cost. In the event of a net increase, the amount thereof plus 10 per cent shall be added to the contract price. In the event of a net decrease, the amount thereof shall be deducted from the contract price.

Article 4: Increase in Price for Increased Labor or Material Costs. The contract price stated in Article 1, as adjusted from time to time, is subject to an increase for increased labor or material costs, determined as follows:

1. Labor:

- (a) The portion of the contract price represented by labor is accepted (for the purposes of this Article only) as \$2,669,000, divided into labor costs quotas for each month of the construction period as follows:

<u>Months After November 1, 1943</u>	<u>Per Cent Increment</u>	<u>Amount</u>
1	1.6	\$ 42,560
2	7.7	204,820
3	22.2	590,520
4	22.6	601,160
5	22.9	609,140
6	16.5	438,900
7	6.5	172,900

- (b) The Commission will obtain from the United States Department of Labor, Bureau of Statistics, the index for the Pacific Coast Zone of the average hourly earnings of production workers in the shipbuilding companies having contracts with the United States Maritime Commission and the Navy Department for the month of October, 1943. The Commission will similarly obtain such average hourly earnings for each subsequent month of the contract period and shall determine to the nearest 1/10th of 1 per cent the percentage, if any, by which such average hourly earnings for the monthly period are greater or less than the average hourly earnings for the month of October, 1943. The percentage of increase or decrease so determined will be applied to the quota above stated for the monthly period and the contract price will be correspondingly increased or decreased.

2. Material:

- (c) The portion of the contract price represented by materials is accepted (for the purposes of this Article only) as \$2,705,600.
- (d) The material cost determined in (c) is hereby divided into material cost quotas for each quarterly period of the contract, as follows:

<u>Quarters After</u> <u>November 1, 1943</u>	<u>Per Cent</u> <u>Increment</u>	<u>Amount</u>
1st (3 months)	61.6	\$1,666,650
2nd (3 months)	37.9	1,025,422
3rd (1 month)	0.5	13,528

- (e) The Commission will obtain from the United States Department of Labor, Bureau of Statistics, the index number of wholesale prices for Group VII, building materials, for the month of October, 1943. The Commission will similarly obtain such index number for each subsequent month of the contract period. The average of the index numbers so obtained for the months included in each quarterly period shall be taken as the index number for such period. The Commission shall determine to the nearest 1/10th of 1 per cent the percentage, if any, by which such average index number for the quarterly period is greater than the index number for the month of October, 1943. The percentage of increase so determined will be applied to the quota above stated for such quarterly period, and the contract price will be correspondingly increased.

3. General:

- (f) The Commission reserves the right to substitute for the index for labor or material any other method or index satisfactory to the Contractor should it at any time in the judgment of the Commission appear that the specified indices do not reflect equitably the increases in costs of material or labor under the contract.
- (g) Payments for increases in contract price pursuant to this Article will be deferred un-

til final payment, provided, however, that the Commission may make partial payments on [124] account of such increases as may accrue from time to time subject to such requirements and conditions precedent to such payments as it may prescribe.

Article 5: Extension of Time for Completion: Termination in Event of Total Loss.

(a) Within 10 days (or such longer period as the Commission may allow) after receipt of direction from the Commission to make changes in the plans and specifications, or approval by the Commission of changes requested by the Contractor, the Contractor will furnish to the Commission in writing a statement of its estimate of the probable resulting delay in completion of the work on the Vessel or Vessels affected by such change. The Commission (or a Board or Committee designated by it to act in its behalf) shall consider the statement so submitted by the Contractor and on the basis thereof and of such other material as it may deem relevant shall determine and furnish to the Contractor in writing a statement of the estimated period of such resulting change, and the date for the completion of the Vessels affected shall be correspondingly extended. If it is later established to the satisfaction of the Contractor and the Commission that the actual delay resulting from such changes varies from such estimate, the extension shall be adjusted accordingly.

(b) In case of any delay caused by the Commission or in case of occurrence of any cause of delay beyond the control of the Contractor, including without limitation acts of God (other than ordinary storms) earthquakes, lightning, floods, or fire, strikes, riots, insurrections, or

war, or delays of subcontractors due to such enumerated causes, written notice thereof and of the anticipated effect thereof shall be given promptly by the Contractor to the Commission. Within 20 days after such cause of delay has ceased to exist, the Contractor shall file with the Commission a statement of the actual delay resulting from such cause. The Commission (or a Board or Committee designated by it to act in its behalf) shall determine the duration of such delay, and the time for the completion of the Vessel or Vessels, the delivery of which has been delayed thereby, shall be correspondingly extended, but only if such delay actually caused delay in the final completion and delivery of the Vessels affected.

(c) If it shall appear to the satisfaction of the Commission that the Contractor has ordered all necessary materials at the proper times and used every reasonable effort to obtain delivery of such materials at the time and in the order required to carry on the work properly but that non-delivery of such materials delayed the completion of any of the Vessels the Commission may, in its discretion, grant such extension of time for the completion of the Vessel or Vessels, delivery of which has been delayed thereby, as it may deem proper under the circumstances.

(d) Without prejudice to the Contractor's rights, the determination of any and all claims for extension of the time for completion shall, at the request of either the Commission or the Contractor, be postponed until the completion of the Vessels.

Article 6: Contractor to Receive and Care for Items Furnished by Commission. The Contractor shall, at its own expense, receive, inspect, check as to agreement with bill of lading, store, insure, protect, and install aboard

the Vessels prior to delivery, all or any of the items required by the specifications or otherwise to be furnished by the Commission.

Article 7: Materials and Workmanship—Domestic Preference. Unless otherwise specifically provided for in this specification, all workmanship, equipment, materials, and articles incorporated in the Vessels covered by this contract are to be of a suitable grade of their respective kinds for the purpose. Where equipment, materials or articles are referred to in the specifications as "equal to" any particular standard, the Commission shall decide [125] in case of dispute, the question of equality, and the decision of the Commission thereon shall be final and conclusive upon the Contractor. The Contractor shall furnish to the Commission for its approval the name of the manufacturer of machinery, mechanical and other equipment, which it contemplates incorporating in the Vessels. When required by the specifications or when called for by the Commission, the Contractor shall furnish full information concerning the materials or articles that it contemplates incorporating in the Vessels. Samples of materials shall be submitted for approval when so directed.

In the performance of the work covered by this contract the Contractor, subcontractors, material men, or suppliers shall use only such unmanufactured articles, materials, and supplies, as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced or manufactured, as the case may be, in the United States; the foregoing provision shall not apply to such articles, materials, or supplies of the

class or kind to be used or such articles, materials, or supplies from which they are manufactured as are not mined, produced, or manufactured, as the case may be, in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality, or to such articles, materials, or supplies as may be excepted by the head of the Department under the proviso of Title III, Section 3 of the Act of Congress approved March 3, 1933 (41 U. S. C. 10).

Article 8: Inspection—Approval of Plans.

(a) All material and workmanship (not otherwise designated by the specifications) shall be subject to inspection, by inspectors of the Commission at any and all proper times during manufacture or construction at any and all places where such manufacture or construction is carried on.

(b) The Contractor shall furnish promptly, without additional charge, all reasonable facilities and materials, including suitably furnished offices with light, heat, telephone, desks, drawing tables, and filing cabinets, necessary for the safe and convenient inspection and test that may be required by the inspectors.

(c) Blue prints of all working plans as they are prepared during the progress of the work shall be submitted (in such numbers as may be required) to the Commission for action and it shall promptly take appropriate action in the time required by the specifications. Requisitions for all materials requiring Commission approval are to be forwarded to the Commission with necessary information before purchases of such materials are made. The Commission shall promptly pass on all plans and requisitions submitted for action.

(d) The Commission shall promptly pass all work and material conforming to the requirements of this contract, and shall promptly reject all work and material not conforming to the requirements of this contract. Rejected workmanship shall be satisfactorily corrected, and rejected material shall be satisfactorily replaced with proper material without charge therefor, and the Contractor shall promptly segregate and remove the rejected material.

(e) All inspection and tests by the Commission shall be performed in such manner as not to unnecessarily delay the work. The Contractor shall be charged with any additional costs of inspection when material and workmanship are not ready at the time inspection is requested by the Contractor.

(f) Any dispute between the Contractor and any representative of the Commission under this Article 8, shall be referred promptly to the Commission, and the decision of the Commission thereon shall be final and conclusive. [126]

(g) The provisions of this Article 8 are subject to the provisions of other Articles of this Contract and the specifications relative to the trials and acceptance of the Vessels.

Article 9: Trials, tests and Delivery. When each Vessel is completed as required by this contract and has passed in a manner satisfactory to the Commission all the trials and tests prescribed in the specifications, the Commission shall accept delivery of such Vessel.

Article 10: Guaranty Period. If at any time within 6 months after the acceptance of each Vessel any weakness, deficiency, defect, failure, breaking down or deterioration in such Vessel, due to defective workmanship or material

supplied by the Contractor including her machinery, appurtenances, and equipment, other than that due to wear and tear, or the negligence or other improper act or omission of the Commission or other operator thereof shall appear, the Contractor shall be required to make good, at its expense, any such defects to the satisfaction of the Commission. Any such work required to be done is to be carried out at a port agreeable to the Commission. In computing said period of 6 months from date of acceptance, the time, if any, but only such time, during which the Vessel is not available for service on account of any weakness, deficiency, defect, failure, breaking down or deterioration of the Vessel for which the Contractor is responsible, shall be excluded.

The Contractor shall be informed of all defects and deficiencies discovered during said guaranty period for which it is held responsible, and, whenever practicable, shall be given an opportunity to inspect the same before the defects and deficiencies are remedied, and the decision of the Commission as to the responsibility of the Contractor for such defects and deficiencies shall be final and binding on the Contractor.

Article 11: Payment of Contract Prices.

(1) Partial payments shall be made by the Commission to the Contractor as the work progresses, at the end of each calendar month or as soon thereafter as practicable: Provided, however, that payments made prior to the final payment herein shall not exceed in the aggregate 96 per cent of the value (as represented by the contract price) of the work done and materials delivered to the yard for the construction of the Vessels, and provided, further, that the

Commission may, on such terms and conditions as it may prescribe, include, as part of the value of the work done on the Vessels work performed by any Subcontractor on materials, machinery or equipment to be installed in the Vessels, even though such Subcontractor has not made delivery thereof at the yard or plant of the Contractor nor Completed the work required of him with respect thereto if the title to such materials, machinery or equipment included as part of the value of the work done on the Vessels shall have vested in the Commission.

The Commission may, on such terms and conditions as it may prescribe, make payment to the Contractor of the full compensation, including retained percentages less authorized deductions, for each Vessel completed and accepted hereunder on the basis of \$304,000 per Vessel.

(2) No payments shall be made except on bills, vouchers, or invoices in such number and form and executed and attested in such manner as shall be prescribed by the Commission. All warrants for payment hereunder shall be made payable to the Contractor or order. [127]

Article 12: Report of Cost—Excess Profits—Subcontractors. The Contractor agrees;

(1) To make a report under oath to the Commission upon completion of this contract, setting forth in the form prescribed by the Commission the total contract price, the total cost of performing this contract, the amount of Contractor's overhead charged to such cost, the net profits and the percentage such

net profit bears to the contract price, and such other information as the Commission shall prescribe;

(2) To pay to the Commission profit, as shall be determined by the Commission, in excess of 10 per cent of the contract price: Provided, That, if such amount is not voluntarily paid, the Commission shall determine the amount of such excess profit and collect it in the same manner that other debts due the United States may be collected;

(3) To make no subdivisions of any contract or subcontract for the same article or articles for the purpose of evading the provisions of this Article, and any subdivision of any contract or subcontract involving an amount in excess of \$10,000 shall be subject to the conditions prescribed in this Article;

(4) That the books, files, and all other records of the Contractor, or any holding, subsidiary, affiliated, or associated company, shall at all times be subject to inspection and audit by any person designated by the Commission, and the premises, including the Vessel, of the Contractor, shall at all times be subject to inspection by the agents of the Commission.

(5) To make no subcontract unless the subcontractor agrees to the foregoing conditions of this Article 12.

It is understood and agreed that the provisions of this Article shall not apply to contracts or subcontracts for scientific equipment used for communication and navigation as may be so designated by the Commission.

The provisions of this Article shall not apply to any subcontract which would otherwise be within such provi-

sions if such subcontract is entered into in any taxable year of the subcontractor to which subchapter E of Chapter 2 of the Internal Revenue Code is applicable, and if such subcontractor is not affiliated, within the meaning of subsection (b) of Section 402 of the Second Revenue Act of 1940, at the time such subcontract is entered into, or any time thereafter, up to and including the date of its completion.

The requirement of payment by the Contractor to the Commission of profits as provided in this Article is contractual and shall in effect constitute a reduction in the contract price payable by the Commission as finally determined hereunder. The method of accounting for profits and the determination of costs incurred by the Contractor shall, however, be in accordance with the requirements of Section 505 (b) of the Merchant Marine Act of 1936 and the applicable regulations of the Commission issued thereunder.

Article 13: Title. The title to all materials, equipment, supplies and all other property assembled at the Contractor's plant or elsewhere for the purpose of being used for the construction of the Vessels as well as title to the Vessels themselves, on account of which payments are made shall immediately be vested in the Commission: Provided, however, that nothing herein contained shall be construed as a waiver by the Commission of its right to require the Contractor to replace, at Contractor's expense, unsatisfactory workmanship or materials as herein provided: Provided further, that the Contractor shall have an equity in any such material, equipment, supplies, and other property to the extent that it may not have been fully paid for by the Commission. [128]

Article 14: Taxes. The Contractor shall pay all United States, State, County, and City or other taxes, assessments or duties lawfully assessed against the Vessels, materials, supplies or equipment to be used under this contract prior to delivery thereof to the Commission. It is understood and agreed, however, that the contract price of the Vessels does not include any Federal tax imposed by Chapters 25 or 29 of the Internal Revenue Code or similar taxes which may hereafter be imposed on the Vessels or subsidiary articles to be purchased by the Contractor and incorporated therein, and that the Commission will issue a Government Tax Exemption Certificate (Standard Form 1094) covering this contract, together with authority to issue certificates of exemption with respect to subsidiary articles purchased by the Contractor on a tax-free basis and in accordance with T. D. 5114, approved January 27, 1942, and any amendments thereto or modifications thereof.

Article 15: Liens.

(a) When payment is to be made under this contract, as a condition precedent thereto, the Commission may, in its discretion, require evidence satisfactory to it, to be furnished by the Contractor showing what, if any, liens or rights in rem of any kind against said Vessels, or their machinery, fittings, or equipment, or the materials on hand for use in the construction thereof, have been or can be acquired for or on account of any work done, or any machinery, fittings, equipment, or material already incorporated as a part of said Vessels, or on hand for that purpose; but it is hereby further stipulated, covenanted, and agreed by the Contractor, for himself and on its own account and for and on account of all persons,

firms, associations, and corporations furnishing labor and material for said Vessels and this contract is upon the express condition that no liens or rights in rem of any kind shall lie or attach upon or against said Vessels or their machinery, fittings, or equipment, or the materials therefor, or any part thereof, or of either, for or on account of any work done upon or about the Vessels, machinery, fittings, equipment, or materials, or of any materials furnished therefor or in connection therewith, nor for or on account of any other cause, or thing, or of any claims or demands of any kind, except the claims of the Commission.

(b) If a lien or encumbrance arising out of the work is filed against the Vessels, or against any materials, equipment, supplies or other property intended therefor, the Contractor shall forthwith notify the Commission thereof, and the Commission, subject to the provisions of this Article 15, may satisfy the same and withhold the amount thereof, together with any expenses incurred in connection therewith from the amount of any payment or payments which may then be due or which may thereafter become due to the Contractor. If the amount of any such payments is insufficient to permit the deduction of the entire cost and expense so incurred by the Commission, the Contractor shall, nevertheless, be liable to the Commission for the deficiency and will pay the same to the Commission on demand. In the event the Commission does not satisfy any such lien or encumbrance, it may, nevertheless, withhold the amount thereof, as provided above, unless and until such lien or encumbrance is satisfied by the Contractor.

(c) If a lien or encumbrance arising out of the work is filed against the Vessels or the materials, equipment,

supplies, or other property intended therefor, the Contractor shall, within 15 days thereafter, cause the Vessels, materials, equipment, supplies or other property to be released and any lien on them or any of them to be discharged; nothing contained herein, however, shall be construed as preventing the Contractor from contesting any such lien or encumbrance or the debt to which it may relate, but in the event of any such contest it shall be the duty of the Contractor within the time named to procure by court order a release of the property [129] from the lien or encumbrance by the filing of a court bond, or otherwise, if any such remedy is available under the law; and in the event it is not, the Contractor shall then immediately take such steps as in the opinion of the Commission shall prevent such lien or encumbrance from delaying the work, and shall indemnify and save harmless the Commission from all costs, charges, and damages incurred, or possible of being incurred, by reason of such contest or in any way attributable thereto.

Article 16: Insurance on Vessels and Materials. Until the Vessels have been completed, physically delivered, and accepted by the Commission, the Vessels and all materials, outfitting, equipment, and appliances to be installed in the Vessels including all materials, outfitting, equipment and appliances provided by either the Commission for and used or to be used in the construction thereof shall, at the expense of the Contractor, be kept fully insured under Builder's Risk form of policies or other usual forms of insurance including loss or damage caused by strikers, locked out workmen, and/or persons taking part in labor disturbances, and/or riot or civil commotion in an amount at no time less than the aggregate of amounts paid the Contractor by the Commission under this agree-

ment plus the value of any materials, outfitting, equipment, and appliances furnished by the Commission. The amount of insurance, the terms of the policies, and the insurance companies, underwriters, or underwriting funds shall at all times be satisfactory to the Commission. All policies of insurance shall be taken out in the name of the Contractor for account of Whom It May Concern, and losses under such policies shall be made payable to the Commission for distribution by it to the Commission, or the Contractor as their respective interests may appear. All cover notes and policies, with all premiums or other charges prepaid, shall be delivered to the Commission for its approval and custody. Policies if not in conformance herewith shall be surrendered and cancelled upon direction of the Commission and new policies procured in conformance herewith.

Article 17: Injury to Employees. The Contractor shall indemnify and save harmless the United States, the Commission, and any other agency or instrumentality of the United States, and the Vessels, against all claims arising from injury to or death of employees, workmen, trespassers, licensees, and all other persons, whether in, on, or about the work to be performed hereunder or from damage to or loss of property, due to the act, neglect or default of the Contractor or subcontractors or their agents or employees; it being expressly understood that the workmen engaged upon the work on the vessel to be constructed hereunder shall at all times be employees of the Contractor or subcontractors and not of the Commission.

Article 18: Patent Infringement. The Contractor shall be responsible for any and all claims made against the Commission, or the Vessels for infringement of patents or patent rights or for the use of patented articles

in connection with the work and material furnished by the Contractor, and shall defend, save harmless, and indemnify the United States, the Commission, and every agency or instrumentality of the United States and the Vessels against all such claims and against all costs, expenses, charges, and damages which the said parties or any of them, may be obliged to pay by reason thereof, including expenses of litigation, if any; provided, however, that upon any such claim being made against said parties or any thereof, the Contractor will be promptly notified of such claim and also of any suit brought in connection therewith and will be given an opportunity to defend the same; and provided, that no payment on account of any such claim shall be made by the said United States, the Commission, or any other agency or instrumentality of the United States, unless either with the consent of the Contractor or pursuant to the decree of a proper court or tribunal. [130]

Article 19: Labor Laws.

(a) The Contractor shall not employ any person undergoing sentence of imprisonment at hard labor.

(b) The Contractor will report monthly, and will cause all Subcontractors to report in like manner, within 5 days after the close of each calendar month on forms to be furnished by the United States Department of Labor, the number of persons on their respective pay rolls, the aggregate amount of such pay rolls, the man-hours worked, and the total expenditures for materials. He shall furnish to the Department of Labor the names and addresses of all Subcontractors on the work at the earliest date practicable: Provided, however, That the requirements of this

paragraph shall be applicable only for work at the site of the construction project.

(c) The Contractor and subcontractors at the site of the construction project will comply with the provisions of Public Act No. 324, 73d Congress, approved June 13, 1934, (48 Stat. 948) and regulations duly issued thereunder, as in effect from time to time. In the event that such regulations, or any part thereof, are superseded or amended from time to time, any such change shall be effective, with respect to this contract, upon the date specified in the action effecting such change, or to the extent permitted thereby, at such earlier date as may be specified in a notice given by the Contractor to the Commission.

(d) The Contractor and its subcontractors shall pay all mechanics and laborers employed on work under this contract and directly upon the site of the work, unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account, the full amounts accrued at time of payment, computed at wage rates not less than those which may be determined by the Secretary of Labor pursuant to the provisions of the Act approved March 3, 1931 (46 Stat. 1494) to be the prevailing rates for the various classes of such laborers and mechanics; and the scale of wages to be paid shall be posted by the Contractor in a prominent and easily accessible place at the site of the work. The Commission shall have the right to withhold from the Contractor and subcontractors so much of accrued payments as may be considered necessary by the Commission to pay to laborers and mechanics employed by the Contractor or any subcontractor on the work the difference between the rates of wages required by the contract to be paid laborers and

mechanics on the work and the rates of wages received by such laborers and mechanics and not refunded to the Contractor, subcontractors or their agents. The Commission will furnish the Contractor with the wage scale determined by the Secretary of Labor as aforesaid, and until such wage scale is so furnished, the Contractor shall be under no obligations under the provisions of this paragraph.

(e) This contract is subject to the provisions of the Act of June 25, 1936, (Public No. 814), entitled "An Act to provide more adequate protection to workmen and laborers on projects, buildings, constructions, improvements, and property wherever situated, belonging to the United States of America, by granting to the several States jurisdiction and authority to apply their State workmen's compensation laws on all property and premises belonging to the United States of America."

Article 20: Eight-Hour Law. Until otherwise provided by law, provisions of law prohibiting more than 8 hours of labor in any one day of persons engaged upon work covered by this contract shall, in accordance with the provisions of the Act approved October 10, 1940 (Public No. 831, 76th Cong.), be suspended. The provisions of said Act approved October 10, 1940 are applicable to this contract. [131]

Article 21: Prohibition against Employment of Certain Persons—Fair Employment Practice. The Contractor shall not employ any person who advocates, or who is a member of an organization that advocates, the overthrow of the Government of the United States by force or violence to perform any part of the work under this contract, and as a condition to the employment of any

person for the performance of such work, the Contractor shall, if the Commission so directs, require such person to execute and to file an affidavit in such form as to satisfy the requirements of Public Law No. 5 (77th Congress), approved February 6, 1941, but the execution and filing of such affidavit shall be without prejudice to the right of the Commission to require such further evidence in the premises as it may deem desirable. The Contractor agrees that in the performance of the work under this contract, it will not discriminate against any worker because of race, creed, color or national origin. (Executive Order No. 8802, approved June 25, 1941.)

Article 22: Fees. The Contractor warrants that he has not employed any person to solicit or secure this contract upon any agreement for a commission, percentage, brokerage, or fee, contingent or otherwise. Breach of this warranty shall give the Commission the right to terminate the contract, or, in its discretion, to deduct from the contract price or consideration the amount of such commission, percentage, brokerage, or fee. This warranty shall not apply to commissions payable by contractors upon contracts or sales secured or made through bona fide established commercial or selling agencies maintained by the Contractor for the purpose of securing business.

Article 23: Working Capital. The Contractor covenants that it will have and maintain at all times sufficient working funds for carrying out its obligations hereunder and will make prompt payments for all labor, materials, services and other charges which are to be paid under this contract. The Commission reserves the right to pay at its option directly to any subcontractor, materialman, laborer or other person furnishing materials, labor or

services for the performance of the work hereunder any amounts which may from time to time be due and unpaid to such persons and to deduct from the payments which may otherwise be due the Contractor under the terms of this contract any amount so paid plus 5 percent thereof, provided it shall have given the Contractor 15 days notice of its intention to make such payment. In the event, however, the Commission exercises such right, it shall be liable to the Contractor for any overpayments which it may make and nothing in this Article contained shall be construed as conferring any rights upon any person or corporation not a party to this contract.

Article 24: Officials not to Benefit nor be Employed. No member of or delegate to Congress, nor Resident Commissioner, shall be admitted to any share or part of this contract or to any benefit that may arise therefrom, except as provided in Section 116 of the Act approved March 4, 1909, (35 Stats. 1109). No member of or delegate to Congress, nor Resident Commissioner, shall be employed by the Contractor either with or without compensation as an attorney, agent, officer, or director. (Sec. 805(e), Merchant Marine Act, 1936.)

Article 25: Events of Default. The following shall constitute events of default under this agreement:

(a) The failure of the Contractor to prosecute the work with such diligence and in such manner as will enable it to deliver the Vessels in accordance with the delivery dates set forth herein, except and to the extent that such failure is due to "force majeure" as hereinbefore defined, provided that the Commission shall have given the Contractor notice of such failure and that the Contractor shall not within 15 days of the date of receipt of

such notice have shown to the satisfaction of the Commission that it has taken steps [132] sufficient to remedy the failure in a manner satisfactory to the Commission.

(b) The failure of the Contractor in any other respect to use due diligence in the performance of the work hereunder or its failure to perform any of the covenants, agreements or undertaking on its part to be performed hereunder, including, but not limited to, its agreement to make prompt payment for all labor, materials, services and other charges which are to be paid under this contract, provided, that the Commission in either instance shall give notice to the Contractor as to such failure, and the Contractor shall not within 15 days after being so notified correct any failure to use due diligence or undertake the performance of said covenants, undertakings or agreements required to cure such failure and thereafter prosecute in good faith to completion all such work or performance required to cure such failure.

(c) The filing by the Contractor of a petition in bankruptcy or for reorganization under the Bankruptcy Act or the entry of an order upon petition against the Contractor adjudicating the Contractor a bankrupt, or the appointment of a receiver or receivers of the Contractor or any property belonging to the Contractor necessary for the performance of its obligations under this agreement.

Article 26: Termination upon Default. In the event any one or more of the events of default specified in the preceding Article shall have occurred, the Commission may, if it so elects, terminate this contract and take possession of the Shipyard, all Vessels either completed or uncompleted, or work in process, and all plans, calculations, memoranda, accounts and records necessary for the

performance of the work hereunder. In the event the Commission takes possession of the Shipyard as aforesaid, the right of the Contractor to use such Shipyard, either under the terms of this contract or any other agreement between the Contractor and the Commission or Defense Plant Corporation, shall terminate, and the Contractor shall release any right, title or interest, including options to purchase, which may be contained in any such agreement. The Contractor may, however, withdraw from the Shipyard and take possession of such items of shipyard equipment and tools owned by the Contractor as would not be incorporated in any of the Vessels or consumed in their construction at such time as the last of the Vessels to be constructed hereunder shall have been completed by the Commission, if it shall have elected to complete the Vessels, or at such time as the Commission shall have notified the Contractor of its intention not to proceed or to abandon the work of completing the Vessels. Until the Contractor shall have the right to withdraw from the Shipyard said equipment and tools as aforesaid, the Commission shall have the right to use free of rental or any other charge such tools and equipment for the sole purpose of completing the Vessels.

In the event of termination under this Article, and if the Commission shall elect to have the Vessels completed, the Contractor shall (1) assign such subcontracts and orders for materials, services and supplies to be used in the performance of work hereunder to the Commission, as the Commission may direct, and (2) pay to the Commission the difference between the total cost to the Commission of completing the Vessels (including all amounts paid to the Contractor hereunder) and the total contract price as stipulated herein, as adjusted under the terms

of this contract. In the event that the Commission shall not elect to complete the Vessels, the Commission may, at any time within 120 days from date of termination hereunder, sell all partially completed Vessels, work in process, and materials and supplies at public sale and apply the proceeds therefrom (i) to the payment of the cost and expenses of said sale; (ii) to the payment of damages sustained by the Commission as a result of the [133] failure of performance of the Contractor, which damages shall be in an amount equal to the total payments made by the Commission to the Contractor under the terms of this contract, less that portion of the contract price which is assignable to Vessels completed prior to the date of termination hereof; and (iii) to the payment to the Contractor of the balance, if any.

The rights conferred upon the Commission under the terms of this Article are in addition to and not in substitution of any rights which the Commission would have in either law or equity upon the happening of the events of default specified herein, or upon any failures on the part of the Contractor to perform the undertakings, agreements and covenants on its part to be performed hereunder. The failure of the Commission to exercise the rights conferred upon it hereunder in any one or more instances of the occurrence of an event of default as hereinbefore defined shall not constitute a waiver of its rights to subsequently terminate this contract as herein provided.

Article 27: Optional Termination of Work hereunder by the Commission.

(a) At any time prior to the completion of the work to be performed under this contract, the Commission may terminate such work, in whole or in part, by notice in

writing. Except as may be otherwise directed in such notice, or as may be required for the purposes of carrying out of any directions contained therein, the Contractor, upon receipt thereof, shall promptly (i) terminate the performance of all work of constructing the Vessels and (ii) notify all subcontractors, suppliers, and other persons who have agreements to furnish labor, materials, or services for the performance of work hereunder, to terminate work under such agreements.

(b) The Commission shall upon termination of work under the provisions of this Article pay promptly to the Contractor an amount equal to the contract price of each Vessel delivered and constructed hereunder. Such contract price shall be deemed to be the amount stated in Article 1 hereof as the price per Vessel, plus or minus, as the case may be, those portions of the adjustments in contract price provided for in Article 3 and Article 4 of this contract, to the extent that such adjustments are applicable to the work performed hereunder.

(c) In addition to the payments provided for under the provisions of paragraph (b) of this Article, the Commission shall pay to the Contractor an amount which the Commission and the Contractor shall agree by supplemental agreement to be reasonably necessary to compensate the Contractor for the whole or any portion of its costs, expenditures, liabilities, commitments and work in respect to Vessels not to be delivered as the result of termination hereunder, and expenses resulting from the termination, provided that such supplemental agreement shall not provide for payment in excess of the maximum amount specified in paragraph (e) hereof.

(d) In the event the Commission and the Contractor shall be unable to reach an agreement as to the amounts to be paid under paragraph (c) of this Article, then the Commission shall, subject to the limitations set forth in paragraph (d) hereof, pay to the Contractor in addition to the payments provided for in paragraph (c) the sum of the following amounts (less any amounts theretofore paid on account of work performed on Vessels not delivered either prior or subsequent to the effective date of termination):

(1) An amount equal to all costs incurred by the Contractor in the performance of work under this contract, as determined by [134] the Commission, less such portion of such costs as is attributable for work performed on Vessels delivered either prior or subsequent to the date of completion;

(2) An amount equal to (i) eight per cent of the net amount payable under the provisions of subparagraph (1) hereof, exclusive, however, of such portion of such net amount as is attributable to the cost of unprocessed material, and (ii) four per cent of that portion of the net amount payable under subparagraph (1) hereof which is attributable to the cost of unprocessed material;

(3) An amount equal to any charges, costs and expenses incurred by the Contractor and approved by the Commission in connection with the termination of work under any subcontract, purchase order or other agreement where such termination is necessary because of termination of work under this agreement (exclusive, however, of such portion of any payments so made as shall represent the price of delivered ar-

ticles, which payment shall be included in the cost payable to the Contractor under subparagraph (1) hereof). The Commission shall include in such costs and expenses the following:

(i) Amounts paid by the Contractor to its subcontractors or others in accordance with the terms of the termination clause, substantially similar to this Article, or substantially similar to any clause which may have been approved by the Commission for inclusion in subcontracts at the time the subcontracts containing such clause were entered into;

(ii) An amount equal to any judgments paid by the Contractor as the result of an action for breach of contract based on termination of work under any subcontract or other agreement required on account of the termination of this contract under this Article, if such amount is not greater than would have been paid at the time the agreement was terminated not contained in the clause in regard to the termination thereof, and if the Commission shall have been given notice of the action and an opportunity to defend the notice named or that of the Contractor; and

(iii) Any other expenses or charges in connection with such termination which the Commission determined to be reasonable; and

(4) Reasonable legal and accounting fees and other expenses, including, but not limited to, the cost of taking inventories, the cost of shipment and selling items which shall become the property of the Com-

mission under paragraph (f) hereof, incurred by the Contractor in connection with the termination of work under this Article, or performance of services necessary to protect or preserve the interests of the Commission.

(e) In no event shall the total amount paid to the Contractor (exclusive of the amounts paid on account of the costs referred to in subparagraph (3) of paragraph (d) hereof, plus an amount equal to any credit which the Contractor is entitled to under paragraph (f) hereof, exceed the total contract price stipulated in this contract.

(f) Title to all work in process and materials and supplies on account of the cost of which the Commission shall make payment under the [135] provisions of the preceding paragraph shall, if such title is not theretofore vested in the Commission under the provisions of the other Articles of this contract, vest in the Commission, except in the case of such work, materials and supplies which the Contractor shall agree to purchase for the then fair value thereof, as determined by the Commission, title to which work, material and supplies shall vest in the Contractor. All work in process, materials and supplies not purchased by the Contractor shall be stored, packed or shipped, in such manner as the Commission may direct, or sold for the account of the Commission, if it so elects.

(g) In the event of termination of work under this Article, the profits which the Contractor shall be entitled to retain under the provisions of Article 12 shall be limited to 10 per cent of the contract price multiplied by the percentage of contract work completed either prior or subsequent to termination in accordance with the provisions of a notice of termination.

(h) The Contractor shall use reasonable care and in addition take such action as may be directed by the Commission to protect and preserve all work, materials and supplies in its possession and control in which the Commission has, or may under the terms of this Article acquire, an interest, and to reduce or prevent loss or damage to the Commission. The termination of all or part of the work under this Article shall not have the effect of terminating the rights and obligations of the parties, except to the extent herein specified.

Article 28: Arbitration. Notwithstanding any other provisions to the contrary, in any case where this agreement provides that determination by the Commission of a question of fact shall be final or conclusive, the Contractor may, within 10 days after the making of such determination, give notice to the Commission of its appeal therefrom. Questions of fact with respect to which an appeal is so taken shall be referred to arbitrators, the Commission and the Contractor each designating one and the two thus appointed, in case of disagreement, designating a third as umpire. The arbitrators shall give prompt notice to both parties of their determinations of such questions of fact, which shall thereupon supersede the determinations of the Commission and shall be binding upon the Commission and the Contractor.

Article 29: Reports of Espionage, Sabotage, or Subversive Activities.

(a) The Contractor shall immediately submit a confidential report to the Navy Department, with copies to the Commission or such other Government agencies as said Department may designate, whenever it has information in-

dicating (i) that any of its employees may be engaged in subversive activity at any place or (ii) that an active danger of espionage or sabotage exists at any plant, factory, or site at which work under the contract is being performed or at which material acquired, fabricated, or manufactured in connection with the performance of the contract is stored. The report shall contain a complete statement of such information. The Contractor shall instruct its personnel to submit any information coming to their attention with respect to the foregoing.

(b) The Contractor shall, whenever directed by the Navy Department or the Commission, submit to the Department any and all information which the Contractor may have concerning any of its employees engaged in work at any plant, factory or site at which work under the contract is being performed.

(c) The Contractor shall refuse to employ, or if already employing will forthwith discharge from employment, and will exclude from any [136] plant, factory or site at which work under the contract is being performed, any person or persons whom the Commission or the Secretary of the Navy or his duly authorized representatives, in the interest of security against espionage, sabotage or subversive activity, may designate.

(d) The Contractor, in each subcontract or purchase order which it may make or place under the contract, shall include stipulations conforming substantially to the language of the preceding paragraphs of this Article, if required by the Navy Department.

Article 30: Renegotiation.

(a) This contract is subject to the provisions of section 403 of the Sixth Supplemental Appropriation Act (Public Law 528, 77th Cong., 2nd Session), as amended and the Contractor hereby agrees that:

1. The contract price may be renegotiated pursuant to the provisions of said Section at a period or periods when, in the judgment of the Chairman of the United States Maritime Commission, the profits can be determined with reasonable certainty;
2. The United States may retain from amounts otherwise due the Contractor, or may require the repayment by the Contractor, if paid to him, of any excessive profits not eliminated by reductions in the contract price, or otherwise, as said Chairman may direct;
3. The Contractor will insert in each subcontract for an amount in excess of \$100,000 made by the Contractor under this contract;

(i) a provision for the renegotiation by said Chairman and the subcontractor of the contract price of the subcontract at a period or periods when, in the judgment of said Chairman, the profits can be determined with reasonable certainty;

(ii) a provision for the retention by the Contractor for the United States of the amount of any reduction in the contract price of any subcontract, pursuant to its renegotiation hereunder, or for the repayment by the subcontractor to the United States of any excessive profits from such subcontract paid to him and not eliminated through

reductions in the contract price, or otherwise, as said Chairman may direct;

(iii) a provision for relieving the Contractor from any liability to the subcontractor on account of any amount so retained by the Contractor, or repaid by the subcontractor to the United States; and

(iv) if the Chairman, in his discretion, shall so require, a provision requiring the subcontractor to insert in any subcontract made by him under such subcontract, provisions corresponding to those of this paragraph (3) and paragraph (4) hereof. [137]

4. The United States may retain from amounts otherwise due the Contractor, or may require the Contractor to repay to the United States, as said Chairman may direct, the amount of any reduction in the contract price of any subcontract made hereunder which the Contractor is directed, pursuant to paragraph 3 of this Article, to withhold from payments otherwise due the subcontractor and actually unpaid at the time the Contractor receives such direction.

In Witness Whereof, the parties hereto have executed this agreement as of the day and year first above written.
(Seal)

UNITED STATES MARITIME COMMISSION

By: E. S. LAND

Chairman

Attest:

A. J. WILLIAMS

Secretary

(Seal)

CONCRETE SHIP CONSTRUCTORS
TAVARES CONSTRUCTION COMPANY, INC.

By: CARLOS TAVARES
President

Attest:

DON F. GATES
Secretary

STROUD AND SEABROOK

By: LLOYD S. STROUD
Lloyd S. Stroud

(Individually and as a partner)

By: R. S. SEABROOK
R. S. Seabrook

(Individually and as a partner)

C. M. ELLIOTT
C. M. Elliott

CARLOS TAVARES
Carlos Tavares

HENRY M. PAGE
Henry M. Page

DON F. GATES
Don F. Gates

Approved as to form:

WADE H. SKINNER
General Counsel

U. S. Maritime Commission [138]

Addendum No. 1

Contract No. MCc-20984

This Agreement, made and entered into as of the 7th day of January, 1944, by and between the United States Maritime Commission (herein called the "Commission") and Tavares Construction Company, Inc., a corporation organized and existing under the laws of the State of California, Lloyd S. Stroud and R. S. Seabrook, individually and as a partnership of Stroud and Seabrook, and C. M. Elliott, Carlos Tavares, Henry M. Page, and Don F. Gates, said corporations and persons being joint venturers doing business under the name of Concrete Ship Constructors (herein called the "Contractor");

Whereas:

1. Under date of October 26, 1943, the Commission and the Contractor entered into a contract (herein called the "Vessel Contract") for the construction by the Contractor of certain concrete barges;

2. The price for such concrete barges stipulated in such contract is subject to adjustment on account of increased labor and material costs, such adjustment to be made in accordance with estimated expenditures for labor and materials;

3. The Contractor has represented and the Commission has agreed that the estimated expenditures for labor and material set forth in the Vessel Contract require revision; and

4. The Commission and the Contractor desire to clarify certain of the provisions of the Vessel Contract.

Now, Therefore, the parties hereto agree as follows:

Article 1. The second paragraph of Article 1 of the Vessel Contract is hereby amended so as to add thereto a sentence reading as follows:

“The Contractor shall also have the right to use any shipyard equipment owned by the Commission, including, in addition to such items as cranes, trucks and the like, tools, patterns, used lumber and forms, but shall not have the right to use items of materials, supplies and equipment acquired for the Commission under any other contract which are consumed in or become a component part of the Vessels. In the event the Contractor shall desire to use any of the latter type of materials, supplies and equipment, the Commission will sell such materials, supplies and equipment to the Contractor for an amount equal to the cost thereof or such other amount as may be acceptable to the parties hereto.”

Article 2. Article 4 of the Vessel Contract is hereby amended so that paragraph (a) under subdivision 1 thereof entitled “labor” shall read as follows:

“(a) The portion of the contract price represented by labor is accepted (for the purposes of this Article only) as \$3,544,225, divided into labor cost quotas for each month of the construction period as follows: [139]

<u>Months After November 1, 1943</u>	<u>Per Cent Increment</u>	<u>Amount</u>
1	1.6	\$ 56,708
2	7.7	272,905
3	22.2	786,818
4	22.6	800,995
5	22.9	811,628
6	16.5	584,797
7	6.5	230,374"

and so that paragraphs (c) and (d) of subdivision 2 thereof entitled "Material" shall read as follows:

"(c) The portion of the contract price represented by materials is accepted (for the purposes of this Article only) as \$2,340,875.

"(d) The material cost determined in (c) is hereby divided into material cost quotas for each quarterly period of the contract, as follows:

<u>Quarters After November 1, 1943</u>	<u>Per Cent Increment</u>	<u>Amount</u>
1st (3 months)	61.6	\$1,441,979
2nd (3 months)	37.9	887,192
3rd (1 month)	0.5	11,704"

Article 3. Article 6 of the Vessel Contract is hereby amended so as to add thereto a sentence reading as follows:

"Nothing herein contained shall be construed as precluding the Contractor's right to an adjustment in contract price pursuant to the provisions of Article 3 hereof in the event the Contractor is required to make installations not contemplated by the plans and specifications."

Article 4. The Contractor shall comply with all safety, security and passive defense requirements in effect as of the date of the Vessel Contract. The Contractor shall have no obligation, however, in connection with such requirements to acquire or construct additional shipyard facilities at the site of the Shipyard referred to in the Vessel Contract unless the Commission shall make available to the Contractor the funds necessary therefor.

Article 5. Nothing contained in the Vessel Contract or in this agreement shall have the effect of divesting the Commission of title to any item of material or equipment or supplies unless the Contractor shall purchase such item pursuant to the provisions of Article 1 of the Vessel Contract as amended by Article 1 hereof, and will acquire on behalf of the Commission all items of equipment, all or part of rentals paid on account of which have been reimbursed to the Contractor or included in the costs allowable under any contract between the Contractor and the Commission other than the Vessel Contract, if under the terms of the rental agreement the Contractor shall be entitled or have an option to acquire such item when the rentals paid thereunder shall equal a stated amount, but the Contractor shall have no obligation to continue the rental of any such item of equipment except as hereinafter expressly provided. The Contractor hereby agrees that unless otherwise directed by the Commission it will continue to rent those items of equipment rented by it as of the date of the Vessel Contract under rental agreements which provide that the title to the items so rented

shall vest in [140] the Commission when the rentals paid equal the replacement value, in the event that the rentals paid on such date equalled 60 percent of such value, provided, however, that if the Contractor shall, prior to the date on which it shall be entitled to acquire title as aforesaid for the Commission, notify the Commission that it no longer requires the item or items of equipment so rented for use at the shipyard referred to in the Vessel Contract, the Commission will elect either to permit the Contractor to cancel the rental agreement or to take an assignment thereof from the Contractor.

Article 6. In addition to performing the work called for by the Vessel Contract and the plans and specifications referred to therein, the Contractor will perform the work described on Exhibit A attached hereto, and the total contract price shall be increased in the sum of \$2,337,500; that is, \$93,500 per vessel.

In Witness Whereof, the parties hereto have executed this agreement as of the day and year first above written.
(Seal)

UNITED STATES MARITIME COMMISSION

By: E. S. LAND

Chairman

Attest:

R. L. McDONALD

Assistant Secretary

(Seal)

CONCRETE SHIP CONSTRUCTORS
TAVARES CONSTRUCTION COMPANY, INC.

By: CARLOS TAVARES
President

Attest:

DON F. GATES
Secretary

STROUD AND SEABROOK

By: LLOYD S. STROUD
Lloyd S. Stroud
(Individually and as a partner)

By: R. S. SEABROOK
R. S. Seabrook
(Individually and as a partner)

C. M. ELLIOTT
C. M. Elliott

CARLOS TAVARES
Carlos Tavares

HENRY M. PAGE
Henry M. Page

DON F. GATES
Don F. Gates

Approved as to form:

WADE H. SKINNER
General Counsel

U. S. Maritime Commission [141]

EXHIBIT A

a. Monorail System. Consists of four (4) light-weight bridge cranes running athwartship over the hatches, each bridge connecting to a single line monorail running fore and aft in the center of the ship, which in turn connects through switches to two (2) monorails running athwartship and extending 12' outboard of the ship, the outboard ends of the monorail to consist of removable jibs. Four (4) 2-ton capacity electric hoists, mounted on carriers, shall be provided. The carrier units shall be equipped with two (2) sets of 1/2 H.P. drivers and with cone-type solenoid activated brakes, enabling operation on at least a seven (7) degree grade. The speeds shall be as follows: Hoist: 30'-35' per minute (except for the first lighter, which will be equipped with hoists having an 18' per minute speed); trolley: 80' per minute; bridge: 70' per minute. The hoist and trolley motions will be controlled by a push button station suspended from the hoist by means of insulated flexible cable, equipped with a suitable arrangement to allow for variation in length. Bridge shall be controlled by means of push buttons mounted on columns adjacent to the hatches.

b. 'Tween Decks. Lodgers for 'tween decks shall be omitted. Inserts, flush with walls and bulkheads, for supporting contemplated decks, shall be installed.

c. Bilge Pump System. Consists of a single 4" header running fore and aft with 3" branches to all holds and voids. Each section shall be fitted with a valve operated from the main deck. Deck fittings shall include an indicator nut and shall be flush with the deck. A motor-driven centrifugal pump, having a capacity of 250 g.p.m. at a 30' head, together with a motor-driven vacuum pump of approximately 12 cu. ft. per minute at 15" shall be installed at the forward end of the vessel.

d. Ventilation. Consists of mechanically ventilating the galley quarters, crews quarters, engine room and pump room. Not less than two (2) electric-driven blowers shall be provided for the system having a total capacity of not less than 10,000 cu. ft. per minute. In addition, two (2) 2000 cu. ft. per minute portable blowers with canvas ducts shall be provided to enable changing of air where necessary.

e. Fire Fighting System. Consists of a single header running fore and aft on the under side of the deck house, with four (4) single outlets therein, one (1) in the crews quarters, one (1) aft, one (1) at the forecastle deck, and one (1) on the roof of the deck house. Each outlet shall be provided with a 50' - 1-1/2" canvas hose, complete with nozzles and racks. A 20 H.P. motor-driven, self-priming, salt water pump, having a capacity of 240 g.p.m. at 60 pounds pressure shall be connected to the header.

f. Electric System. Consists of two (2) 20 KW 250 volt, 3 phase alternating current, Palmer patented, diesel-driven generators. A 1500 gallon capacity fuel oil tank, with one (1) 100 gallon capacity day tank shall be provided. The Generators shall be capable of being paralleled through a switchboard by means of circuit breakers, and set of synchronizing lamps. Transformers shall be provided to supply [142] 120V single phase lighting current. Cooling system for the diesel engines shall consist of a heat exchanger circulating salt water, provided with a salt water pump, and will include a fresh water surge tank.

g. Lighting System. Consists of lines running fore and aft, one on each side of the ship and one along the center, from which approximately thirty (30) 75 watt lights with fixtures will be evenly distributed from the under side of the deckhouse, together with twelve (12) plug-ins installed at convenient locations. All cargo holds shall have two (2) plug-ins and two (2) fixed lights. Twelve (12) 150 watt flood lights with 30 feet of flexible cord for use on the deck and in the holds shall be provided, together with eight (8) 250 watt portable flood lights with 50 feet of flexible cord suitable for brocket mounting over the deckhouse doors, to facilitate loading and discharging.

h. Crews Quarters, Galley, Store and Engine Rooms. The general arrangement of the quarters, galley, store and engine rooms shall be in accordance with Concrete Ship

Constructors' plan #PD-1o-HZ-62A, dated 2 January 1944. A motor-driven pump shall be provided for the salt water system.

i. Refrigerator. One (1) 150 cu. ft. capacity, electric-driven refrigerator shall be provided.

j. Fresh Water: Two (2) 150 gallon capacity tanks and one (1) 1500 gallon water tank shall be provided to supply fresh water to the galley.

k. Windlasses. Two (2) windlasses, driven by 15 H.P. direct connected electric motors, shall be provided, similar to size No. 3 as shown on page 36, American Engineering Catalog No. M-41, except altered to fit electric drive.

l. Capstan. Consists of 15 H.P. motor-driven unit similar to Model E, as shown on page 48 of American Engineering Catalog No. M-41, except that the minimum diameter of the barrel shall be 14" instead of 11-3/4".

m. Deckhouse. The deckhouse shall be raised one (1) foot from the original approved height in order to provide necessary clearance to install monorail equipment.

n. Spares. Consist of parts for all of the mechanical equipment, sufficient in quantity for one (1) year continuous service, in accordance with the manufacturer's recommendations. [143]

Addendum No. 2

Contract No. MCc-20984

This Agreement, made and entered into as of the 10th day of October, 1944, by and between the United States Maritime Commission (herein called the "Commission") and Tavares Construction Company, Inc., a corporation organized and existing under the laws of the State of California, Lloyd S. Stroud and R. S. Seabrook, individually and as a partnership of Stroud and Seabrook, and C. M. Elliott, Carlos Tavares, Henry M. Page, and Don F. Gates, said corporation and persons being joint venturers doing business under the name of Concrete Ship Constructors (herein called the "Contractor");

Witnesseth:

1. Whereas, under date of October 26, 1943, the Commission and the Contractor entered into a contract (herein called the "Vessel Contract") for the construction by the Contractor for the Commission of certain concrete barges (herein called the "Barges");

2. Whereas, the Commission has heretofore instructed the Contractor to complete three of the Barges (designated Contractor's Hull Nos. 45-47, inclusive, herein called the "Converted Barges") as refrigerated lighters;

3. Whereas, by letter agreement dated April 13, 1944, between the Commission and the Contractor, the contract price stated in Article 1 of the Vessel Contract was amended solely for the purpose of making payments to the Contractor under the provisions of Article 11 of the Vessel Contract on account of the additional costs incurred by it in connection with the Converted Barges;

4. Whereas, the Contractor has now submitted a detailed cost estimate for completing the Converted Barges and has requested the Commission to increase the contract price accordingly.

Now, Therefore, it is agreed by and between the parties hereto as follows:

Article I. The contract price stated in Article 1 of the Vessel Contract is hereby amended so that it shall read "\$11,949,765", such increase in contract price being made to provide for the additional costs incurred and to be [144] incurred by the Contractor in connection with converting the Converted Barges to refrigerated lighters, it being understood that the cost of other authorized changes has not been included in the aforesaid increase in contract price.

Article II. Except as hereinbefore otherwise specifically provided, all of the terms and conditions of the Vessel Contract shall remain in full force and effect.

In Witness Whereof, the parties hereto have executed this agreement as of the day and year first above written.
(Seal)

UNITED STATES MARITIME COMMISSION

By: E. S. LAND

Chairman

Attest:

JOHN R. TANKARD

Acting Assistant Secretary

(Seal)

CONCRETE SHIP CONSTRUCTORS
TAVARES CONSTRUCTION COMPANY, INC.

By: CARLOS TAVARES
President

Attest:

DON F. GATES
Secretary

STROUD AND SEABROOK

By: LLOYD S. STROUD
Lloyd S. Stroud

(Individually and as a partner)

By: R. S. SEABROOK
R. S. Seabrook

(Individually and as a partner)

C. M. ELLIOTT

C. M. Elliott

CARLOS TAVARES

Carlos Tavares

HENRY M. PAGE

Henry M. Page

DON F. GATES

Don F. Gates

Approved as to form:

WALSTON S. BROWN

Asst. General Counsel

U. S. Maritime Commission [145]

EXHIBIT 5

Contract No. MCc-7913

This Agreement, entered into this 30th day of June, 1942, by and between the United States Maritime Commission (hereinafter called the "Commission") and Tavares Construction Company, Inc., a corporation organized and existing under the laws of the State of California, Lloyd S. Stroud and R. S. Seabrook, individually and as the partnership of Stroud and Seabrook, and C. M. Elliott, said corporations and persons being joint venturers doing business under the name of Concrete Ship Constructors and being hereinafter referred to as the "Contractor":

Whereas:

1. Under the provisions of Public Law 247 (77th Congress) approved August 25, 1941, the Commission is authorized to construct in the United States, merchant vessels of such type, size and speed as it may determine to be useful for carrying on the commerce of the United States and suitable for the conversion into naval or military auxiliaries and to produce and procure parts, equipment, material and supplies for such vessels, without advertising or competitive bidding;

2. The Commission has determined that the vessel hereinafter described is of a type, size and speed which will be useful for carrying on the commerce of the United States and suitable for conversion into naval or military auxiliaries, and desires the contractor to construct said vessel;

3. The aforementioned individuals, partnership and corporation warrant and represent that they are, and each of them is, authorized and has full power to undertake the obligations hereinafter set forth, and that the stockholders and directors of said corporation have taken all action required by law and by its Certificate of Incorporation and by-laws to authorize its officers to execute, acknowledge and deliver this contract; and

4. The Contractor is willing to construct the vessel hereinafter described upon the terms and conditions and for the consideration hereinafter set forth;

Now Therefore, the parties hereto agree as follows:

Article 1. General Statement of Work.

(a) The Contractor will furnish all labor, material, supplies and equipment and will perform all work necessary to construct, build and deliver, and will construct, build and deliver at his own risk and expense seventeen concrete barges (herein called the "Vessels") in strict accordance with the plans and specifications referred to in Article 3 hereof, and will do everything required of the Contractor by this contract and the plans and specifications, including the installation of any outfitting or equipment furnished by the Commission, all for the consideration hereinafter stated.

(b) The Vessels shall be constructed at the Contractor's shipyard to be located at National City, California (herein called the "Shipyard") and each Vessel when completed, and after passing the tests prescribed in the specifications in a manner satisfactory to the Commission shall be delivered to the Commission alongside of a safe and accessible pier at or near the Shipyard where

there shall be sufficient water for the Vessels always to be afloat, custom to the contrary notwithstanding, free and clear of all liens and claims of every nature or at such other place as may be mutually agreed upon.

Article 2. Additional Facilities. The Contractor hereby agrees to acquire, within the shortest possible time, such shipyard facilities as in addition to those heretofore acquired by the Contractor are necessary for the performance of the work under this contract and for such purpose will [146] enter into an agreement satisfactory in form and substance to the Commission with Defense Plant Corporation for the financing of the cost of such additional facilities. In addition to the payments provided for in Article 2 of the contract between the Contractor and the Commission dated November 27, 1941 (Contract No. MCc-1879) and those provided for in Article 15 hereof, the Commission will reimburse the Contractor for any and all rental payments made during the term of this contract to Defense Plant Corporation pursuant to the aforementioned agreement to be made by the Contractor with such corporation, but in no event shall the obligation of the Commission to make payments hereunder exceed the sum of \$77,260 per Vessel delivered under the terms of this contract.

Article 3. Plans and Specifications; Interpretation and Changes.

(a) The drawings or plans, and specifications (herein called the "plans and specifications") designated "United States Maritime Commission Plans and Specifications dated November 13, 1941" for the construction of the Vessels have, at or before the execution of this contract,

been identified by the signatures of the parties hereto and are hereby made a part hereof with the same force and effect as though herein set out in full.

(b) If any discrepancy, difference, or conflict exists between the provisions of this agreement and the plans and specifications, then, to the extent of such discrepancy, difference or conflict only, the plans and specifications shall be ineffectual and the provisions hereof shall prevail; but in all other respects the plans and specifications shall be in full force and effect. Any question whether the plans and specifications are in conflict with the provisions of this instrument and any conflict or discrepancy between the plans and specifications themselves shall be brought to the attention of the Commission; in such cases specific directions will be given in writing by the Commission to the Contractor and compliance by the Contractor with such directions shall be obligatory.

(c) The Contractor shall not (except as provided in subsection (b)) depart from the requirements of the plans or specifications without prior written approval of the Commission. The Contractor shall, in making application to the Commission for changes in the plans or specifications, set forth clearly the reasons for or the advantages of such changes. The right is reserved, however, by the Commission to make any deductions from, additions to, or further developments of the plans and specifications within the general scope thereof.

Article 4. Contract Price. The contract price of all the Vessels shall be the sum of \$11,781,000 (based on \$693,000 per Vessel) together with such additions and subject to such deductions as are hereinafter provided.

Article 5. Adjustments of Price for Change in Plans and Specifications. Within 10 days (or such longer period as the Commission may allow) after receipt of direction from the Commission to make changes in the plans or specifications of any of the Vessels, or of approval by the Commission of changes requested by the Contractor, the Contractor will furnish to the Commission in writing a statement of its estimate of the net increase or net decrease in cost to result from such change. The Commission (or a Board or Committee designated by it to act in its behalf) shall consider the statement so submitted by the Contractor and on the basis thereof and of such other material as it may deem relevant shall determine and furnish to the Contractor the amount of any such net increase or net decrease in cost. In the event of a net increase, the amount thereof plus 10 per cent shall be added to the contract price. In the event of a net decrease, the amount thereof shall be deducted from the contract price. [147]

Article 6. Adjustments in Contract Price.

(a) The contract price of the Vessels to be constructed and delivered hereunder as stated in Article 4, as adjusted from time to time, is subject to increase or decrease for increased or decreased labor and material cost determined as follows:

1. Labor.

A. The portion of the contract price represented by labor is accepted (for the purposes of this Article only) as \$3,354,300, divided into labor cost quotas for each month of the construction period as follows:

<u>Months After July 1, 1942</u>	<u>Per Cent Increment</u>	<u>Amount</u>
1	1.5	\$ 53,014
2	2.5	88,358
3	4.4	155,509
4	6.8	240,332
5	10.0	353,430
6	11.9	420,582
7	11.8	417,047
8	10.9	385,239
9	10.2	360,499
10	9.0	318,087
11	7.2	254,470
12	5.9	208,524
13	4.1	144,906
14	2.7	95,426
15	1.0	35,343
16	0.1	3,534

B. The Commission will obtain from the United States Department of Labor, Bureau of Statistics, the average hourly earnings in the Durable Goods Group of Manufacturing Industries for the month of May, 1942. The Commission will similarly obtain such average hourly earnings for each subsequent month of the contract period. The Commission shall determine to the nearest 1/10th of 1 per cent the percentage, if any, by which such average hourly earnings for the monthly period are greater or less than the average hourly earnings for the month of

May, 1942. The percentage of increase or decrease so determined will be applied to the quota above stated for such monthly period, and the contract price will be correspondingly increased or decreased.

2. Materials.

A. The portion of the contract price represented by material is accepted (for the purposes of this Article only) as \$5,301,450, divided into material cost quotas for each quarterly period of the construction of such Vessels as follows:

<u>Quarters After</u> <u>July 1, 1942</u>	<u>Per Cent</u> <u>Increment</u>	<u>Amount</u>
1st (3 months)	19.9	\$1,054,989
2nd (3 months)	32.2	1,707,067
3rd (3 months)	26.6	1,410,186
4th (3 months)	15.6	827,026
5th (3 months)	5.6	296,881
6th (5 days)	0.1	5,301 [148]

B. The Commission will obtain from the United States Department of Labor, Bureau of Statistics, the index number of wholesale prices for Group VII, building materials, for the month of May, 1942. The Commission will similarly obtain such index number for each subsequent month of the contract period. The average of the index numbers so obtained for the months in-

cluded in each quarterly period shall be taken as the index number for such period. The Commission shall determine to the nearest 1/10th of 1 per cent the percentage, if any, by which such average index number for the quarterly period is greater or less than the index number for the month of May, 1942. The percentage of increase or decrease so determined will be applied to the stated quota for the quarterly period, and the contract price will be increased or decreased by the resulting amount.

(b) In the event that during the progress of the work hereunder the Commission shall determine that the quotas set forth above do not adequately reflect the relative percentage of labor and material expenditures made by the Contractor during the quota months or quota periods of the construction of the Vessels, adjustments will be made in such quotas. The quotas of labor and materials will not be altered on account of delays in the completion of the Vessels unless extension in contract time is authorized by the Commission, in which case revised quotas as determined by the Commission will be used.

(c) The Commission reserves the right to substitute for the method of adjustment set forth in paragraph (a) any other method satisfactory to the Contractor should it at anytime in the judgment of the Commission appear that the specified methods do not reflect equitably the increase in cost of material and labor under the contract.

(d) The contract price as adjusted under Article 5 and paragraph (a) of this Article shall be subject to further adjustment as follows:

(1) In the event that the amounts which have been properly paid or which are payable to the Contractor under the provisions of paragraphs (a) and (c) of Article 15 shall exceed the contract price stated in Article 4 as adjusted under the provisions of Article 5 and paragraph (a) of this Article, the contract price shall be further adjusted so that it shall equal said amounts paid or payable to the Contractor under the provisions of said paragraphs (a) and (c) as determined by audit.

(2) In the event that the contract price stated in Article 4 as adjusted under the provisions of Article 5 and paragraph (a) of this Article shall exceed the amounts which have been properly paid or are then payable to the Contractor under paragraphs (a) and (c) of Article 15, the contract price shall be decreased by such amount as will cause it to equal said amounts paid or payable under said paragraphs (a) and (c) of said Article 15 plus those payable under paragraph (d) of such Article.

Article 7. Delivery Dates. The work under this contract shall be commenced within five days of the date hereof, and each of the Vessels shall be completed in accordance with the following schedule: [149]

<u>Commission's Hull Numbers</u>	<u>Contractor's Hull Numbers</u>	<u>Delivery Dates</u>
1220	6	December 25, 1942
1221	7	January 20, 1943
1222	8	February 5, 1943
1223	9	February 20, 1943
1224	10	March 5, 1943
1225	11	April 5, 1943
1226	12	April 15, 1943
1227	13	May 5, 1943
1228	14	May 15, 1943
1229	15	June 10, 1943
1230	16	June 25, 1943
1231	17	July 10, 1943
1232	18	July 25, 1943
1233	19	August 20, 1943
1234	20	September 5, 1943
1235	21	September 20, 1943
1236	22	October 5, 1943

Article 8. Extension of Time for Completion.

(a) Within 10 days after receipt or direction from the Commission to make changes in the plans and specifications, or approval by the Commission of changes requested by the Contractor, the Contractor will furnish to the Commission in writing a statement of its estimate of the probable resulting change in the time for completion of the work on any Vessel or Vessels affected by such change. The Commission (or a board or committee designated by it to act in its behalf) shall consider the statement so submitted by the Contractor and on the basis thereof and of such other material as it may deem rele-

vant, shall furnish to the Contractor an estimate of such resulting change, and the date for the completion of the Vessels affected shall be correspondingly changed. If it is later established to the satisfaction of the Contractor and the Commission that the actual change in time resulting from such changes varies from such estimate, the change shall be adjusted.

(b) In case of any delay caused by the Commission or any other agency or instrumentality of the United States, or in case of the occurrence of any cause of delay beyond the reasonable control of the Contractor, including without limitation, non-delivery or late delivery of materials and equipment (but only if the Contractor has ordered such material and equipment at proper times and used every reasonable effort to obtain delivery thereof at the times required), Government priorities, acts of God (other than ordinary storms or inclement weather conditions), earthquakes, lightning, floods or fire, strikes, riots, insurrections or war, or delays of subcontractors due to such enumerated causes, written notice thereof and the anticipated results thereof shall be given promptly by the Contractor to the Commission. Within 20 days after such cause of delay has ceased to exist, the Contractor shall file with the Commission a statement of the actual delay resulting from such cause. The Commission (or a Board or Committee designated by it to act in its behalf) shall determine the duration of such delay, and the time for completion of the Vessel or Vessels, the delivery of which has been delayed thereby, shall be correspondingly extended.

(c) Without prejudice to the Contractor's rights, the determination of any and all claims for change in the time for completion of any Vessel shall, at the request

of either the Commission or the Contractor, be postponed until the completion of such Vessel. [150]

Article 9. Liquidated Damages or Bonuses for Early or Late Completion. In case the Contractor shall fail to complete and deliver any Vessel within the time herein prescribed (as extended under the provisions of the preceding Article) there shall be deducted as liquidated damages from the amount payable to the Contractor under the provisions of paragraph (d) of Article 15 hereof the sum of \$50.00 for each calendar day or part thereof during which the delivery of each Vessel is so delayed. In the event that the Contractor shall, however, complete any Vessel prior to the time prescribed for such completion, there shall be paid as bonus to the Contractor, in addition to the other payments specified in this contract, the sum of \$50.00 for each calendar day elapsing from the date on which the Vessel is actually delivered to the date prescribed for such delivery. The total amount of liquidated damages payable hereunder shall be limited to the amount which would otherwise be payable to the Contractor under the provisions of paragraph (d) of Article 15, and bonus payments shall be subject to the limitations set forth in said paragraph (d).

Article 10. Contractor to Receive and Care for Items Furnished by Commission. The Contractor shall receive, inspect, check as to agreement with bill of lading, store, insure, protect, and install aboard the Vessels prior to delivery, all or any of the items required by the specifications or otherwise to be furnished by the Commission.

Article 11. Materials and Workmanship—Domestic Preference. In the performance of the work covered by

this contract the Contractor, subcontractors, material men, or suppliers shall use only such unmanufactured articles, materials, and supplies, as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced or manufactured, as the case may be, in the United States; the foregoing provision shall not apply to such articles, materials, or supplies of the Class or kind to be used or such articles, materials, or supplies from which they are manufactured as are not mined, produced, or manufactured, as the case may be, in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality, or to such articles, materials, or supplies as may be excepted by the head of the Department under the proviso of Title III, Section 3, of the Act of Congress approved March 3, 1933 (41 U. S. C. 10).

Article 12. Inspection—Approval of Plans.

(a) All material and workmanship shall be subject to inspection, by inspectors of the Commission or such other representatives as the Commission may designate at any and all proper times during manufacture or construction at any and all places where such manufacture or construction is carried on.

(b) The Contractor shall furnish promptly all reasonable facilities and materials, including suitably furnished offices with light, heat, telephone, desks, drawing tables, and filing cabinets, necessary for safe and convenient inspection and any test that may be required by the inspectors.

(c) Working plans shall be submitted to the Commission in accordance with such procedure as it may prescribe and blueprints of such plans shall be furnished when required by the Commission. The Commission shall promptly pass on all plans and requisitions submitted for action.

(d) The Commission shall promptly pass all work and material conforming to the requirements of this contract, and shall promptly reject all work and material not conforming to the requirements of this contract. Rejected workmanship shall be satisfactorily corrected, and rejected material shall be satisfactorily replaced with proper material, and the Contractor [151] shall promptly segregate and remove the rejected material.

(e) All inspection and tests by the Commission shall be performed in such manner as not to unnecessarily delay the work. The Contractor shall be charged with any additional costs of inspection when material and workmanship are not ready at the time inspection is requested by the Contractor.

(f) Any dispute between the Contractor and any representative of the Commission under this Article, shall be referred promptly to the Commission, and the decision of the Commission thereon shall be final and conclusive.

(g) The provisions of this Article are subject to the provisions of this contract relative to the trials and acceptance of the Vessels.

Article 13. Tests and Acceptance. When each barge is completed and after the Commission has made such tests thereon as it may prescribe, such barge, if it meets with the requirements of the plans and specifications and

this contract, will be accepted by the Commission subject to the provisions of Article 14.

Article 14. Guarantee Period. If at any time within 6 months after the acceptance of each Vessel any weakness, deficiency, defect, failure, breaking down or deterioration in such Vessel, including her machinery, appurtenances, and equipment, other than that due to wear and tear, or the negligence of other improper act or omission of the Commission or other operator thereof shall appear, the Contractor will be required to make good, at its expense, any such defects to the satisfaction of the Commission. Any such work required to be done is to be carried out at a port agreeable to the Commission. In computing said period of 6 months from date of acceptance, the time, if any, but only such time, during which the Vessel is not available for service on account of any weakness, deficiency, defect, failure, breaking down or deterioration of the Vessel for which the Contractor is responsible, shall be excluded.

The Contractor shall be informed of all defects and deficiencies discovered during said guarantee period for which it is held responsible, and, whenever practicable, shall be given an opportunity to inspect the same before the defects and deficiencies are remedied, and the decision of the Commission as to the responsibility of the Contractor for such defects and deficiencies shall be final and binding on the parties to this contract.

No payments made under the provisions of this Article shall be included in the cost of the Vessels for the purpose of making payments under the provisions of Article 15 hereof or otherwise. The total liability of the Contractor under this Article shall be limited as to each Vessel to

be constructed hereunder to the amount of payments which are payable or which have been paid to the Contractor on account of said Vessel under the provisions of paragraph (c) of Article 15, and, in addition, as to all Vessels to be constructed hereunder, to the amount of payments which are payable or which have been paid to the Contractor under the provisions of paragraph (d) of Article 15.

Article 15. Payment of Contract Price.

(a) Partial payments on account of the contract price shall be made during the progress of the work hereunder to the Contractor by the Commission at semi-monthly or such other intervals as the parties may mutually agree upon. Such partial payments shall be based upon that portion of the value of the work done and materials on hand which is represented by the cost thereof (inclusive of overhead), and the Contractor shall accompany each voucher for such partial payment with a statement in form satisfactory [152] to the Commission setting forth such cost. Any payment made on the basis of such voucher shall be subject to adjustment upon final audit by the Commission. The Commission may, upon such terms and conditions as it may prescribe, include, as part of the value of work and materials, work performed by any subcontractor or materials, machinery or equipment to be installed in the Vessels, although not yet delivered, if title to such materials, machinery or equipment shall have vested in the Commission.

(b) No payments shall be made except on bills, vouchers, or invoices in such number and form and executed and attested in such manner and supported by such evidence as shall be prescribed by the Commission. All

warrants for payments hereunder shall be made payable to the Contractor or order.

(c) Upon launching of each Vessel, there shall be paid to the Contractor, in addition to the payments provided for in paragraph (a) hereof, the sum of \$9,450, and upon delivery thereof the sum of \$9,450.

(d) In the event that the payments made under paragraphs (a) and (c) hereof shall, upon completion and delivery of all the Vessels and a final audit under this contract, be found to be less than the contract price stated in Article 4 and adjusted under the provisions of Article 5 and paragraph (a) of Article 6, the Commission shall pay to the Contractor an amount equal to (i) 50 percent of the sum by which the contract price, adjusted as aforesaid, exceeds the amount paid under the provisions of paragraphs (a) and (c), less (ii) any liquidated damages payable under Article 9 hereof, plus (iii) any bonuses payable under said Article 9; Provided, that in no event shall the total amount payable under the provisions of this paragraph (including bonuses payable under the provisions of Article 9 hereof) exceed the sum of \$749,700.

(e) The payments specified in the preceding paragraphs of this Article shall constitute full consideration to the Contractor for all the work to be performed under the provisions of this contract.

Article 16. Determination of Cost.

(a) For the purposes of making payments under Article 15 hereof the term "cost" as therein used shall include all amounts which the Commission determines are chargeable directly to the construction, outfitting and

equipping of the Vessels or to constitute items of overhead expense which are not directly chargeable thereto but are incident and necessary for the work of constructing, outfitting and equipping the Vessels. Such cost shall be determined by the Commission in accordance with the applicable provisions of its "Regulations Prescribing the Method for Determining Profit, Adopted May 4, 1939", it being understood and agreed that there shall be included in such costs overhead and depreciation on any equipment or plant furnished by the Contractor for use in connection with the work hereunder and the cost of expendable tools and supplies consumed in accordance with and to the extent permitted by the provisions of said Regulations.

(b) In determining cost for the purpose of Article 15 hereof the Commission will exclude therefrom (1) any expense, including (without limitation) traveling expense, deemed by the Commission to be excessive, (2) the cost of remedying work and replacing materials which are defective because of the failure of the Contractor to use reasonable diligence and the cost of performing any work required under the provisions of Article 14 hereof, (3) rental payments made by the Contractor to Defense Plant Corporation, (4) the exclusions required under paragraph 7.23 of said "Regulations Prescribing the Method of Determining Profit, Adopted May 4, 1939" as amended, (5) costs incurred by the Contractor in contravention of the provisions of [153] this contract including those of Article 17, and (6) contributions to charities, community or other organizations.

(c) All costs shall be scrutinized by the Commission to determine that they are fair, just and not in excess of the market price for the materials and services for which they are incurred.

(d) Statement returns relative to expenditures shall be made as and when directed by the Commission, and all books, files and other records in respect thereto shall at all times be open for inspection by representatives of the Commission.

Article 17. Purchases, Subcontracts and Wage Rates.

(a) Wherever practicable, the Contractor shall obtain from responsible firms and individuals competitive bids for the material, equipment and services required in connection with the performance of the work under this contract and shall award orders therefor to the lowest satisfactory bidder. Where, however, such procedure is not practicable or expedient, contracts may be made and orders awarded upon the basis of market or negotiated prices. No order shall, however, be placed or subcontract made which calls for the performance of services or the delivery of materials, equipment and machinery at a price in excess of \$10,000 per Vessel without the prior approval of the Commission or its authorized representative.

(b) Subject to applicable laws and regulations of any agency of the United States issued pursuant to such laws, the rate of wages paid by the Contractor for work performed under this contract shall not, without the consent of the Commission, be in excess of those established by any stabilization or other conference held under the auspices of the National Defense Advisory Commission or other agency of the United States for the region in which the Shipyard is located, or in the event that rates have not been established for such region, in excess of those which may be approved from time to time by the Commission.

Article 18. Title. The title to all materials, equipment, supplies, and all other property assembled at the Shipyard or elsewhere for the purpose of being used for the construction of the Vessels, as well as title to the Vessels themselves, on account of which payments are made shall immediately be vested in the Commission: Provided, however, that nothing herein contained shall be construed as a waiver by the Commission of its right to require the Contractor to replace, at Contractor's expense, unsatisfactory workmanship or materials as herein provided: Provided further, that the Contractor shall have an equity in any such material, equipment, supplies, and other property to the extent that it may not have been fully paid for by the Commission.

Article 19. Taxes. The Contractor shall pay all United States, State, County, and City or other taxes, assessments or duties lawfully assessed against the Vessels, materials, supplies or equipment to be used under this contract prior to delivery thereof to the Commission.

Article 20. Liens.

(a) When payment is to be made under this contract, as a condition precedent thereto, the Commission may, in its discretion, require that evidence satisfactory to it, to be furnished by the Contractor showing what, if any, liens or rights in rem of any kind against the Vessels, or their machinery, fittings, or equipment, or the materials on hand for use in the construction thereof, have been or can be acquired for or on account of any work done, or any machinery, fittings, equipment, or material already [154] incorporated as a part of said Vessels, or on hand for that purpose; but it is hereby further stipulated,

covenanted, and agreed by the Contractor, for itself and on its own account and for and on account of all persons, firms, associations, and corporations furnishing labor and material for the Vessels, and this contract is upon the express condition that no liens or rights in rem of any kind shall lie or attach upon or against the Vessels or their machinery, fittings, or equipment, or the materials therefor, or any part thereof, or of either, for or on account of any work done upon or about said Vessels, machinery, fittings, equipment, or materials, or of any materials furnished therefor or in connection therewith, nor for or on account of any other cause, or thing, or of any claims or demands of any kind, except the claims of the Commission.

(b) If a lien or encumbrance arising out of the work to be performed hereunder is filed against the Vessels, or any of them, or against any materials, equipment, supplies or other property intended therefor, the Contractor shall forthwith notify the Commission thereof, and the Commission, subject to the provisions of this Article, may satisfy the same and withhold the amount thereof, together with any expenses incurred in connection therewith from the amount of any payment or payments which may then be due or which may thereafter become due to the Contractor. If the amount of any such payments is insufficient to permit the deduction of the entire cost and expense so incurred by the Commission, the Contractor shall, nevertheless, be liable to the Commission for the deficiency and will pay the same to the Commission on demand. In the event the Commission does not satisfy any such lien or encumbrance, it may, nevertheless, with-

hold the amount thereof, as provided above, unless and until such lien or encumbrance is satisfied by the Contractor.

(c) If a lien or encumbrance arising out of the work to be performed hereunder is filed against the Vessels, or any of them, or the materials, equipment, supplies, or other property intended therefor, the Contractor shall within 15 days thereafter, cause the Vessel or Vessels, materials, equipment, supplies or other property to be released and any lien on them or any of them to be discharged; nothing contained herein, however, shall be construed as preventing the Contractor from contesting any such lien or encumbrance or the debt to which it may relate, but in the event of any such contest it shall be the duty of the Contractor within the time named to procure by court order a release of the property from the lien or encumbrance by the filing of a bond, or otherwise, if any such remedy is available under the law; and in the event it is not, the Contractor shall then immediately take such steps as in the opinion of the Commission shall prevent such lien or encumbrance from delaying the work, and shall indemnify and save harmless the Commission from all costs, charges, and damages incurred, or possible of being incurred, by reason of such contest or in any way attributable thereto.

Article 21. Insurance on Vessels and Materials. Until each Vessel has been completed, physically delivered, and accepted by the Commission, such Vessel and all materials, outfitting, equipment, and appliances to be installed in the Vessels including all materials, outfitting, equipment and appliances provided by the Commission for and used or to be used in the construction thereof shall be

kept fully insured under Builder's Risk form of policies or other usual forms of insurance including loss or damage caused by strikers, locked out workmen, and/or persons taking part in labor disturbances, and/or riot or civil commotion and/or malicious damage and/or sabotage and/or vandalism and such other forms of insurance as the Commission may require in an amount at no time less than the aggregate of amounts paid or payable to the Contractor by the Commission under this agreement plus the value of any materials, outfitting, equipment, and appliances furnished by the Commission. The amount of insurance, the terms of the policies, and the insurance companies, underwriters, or underwriting funds shall [155] at all times be satisfactory to the Commission. All policies of insurance shall be taken out in the name of the Contractor for account of Whom It May Concern, and losses under such policies shall be made payable to the Commission for distribution by it to the Commission, or the Contractor as their respective interests may appear. All cover notes and policies, with all premiums or other charges prepaid, shall be delivered to the Commission for its approval and custody. Policies if not in conformance herewith shall be surrendered and cancelled upon direction of the Commission and new policies procured in conformance herewith.

The Contractor may, in its discretion, and shall, if and as required by the Commission, secure fidelity and other similar bonds, workmen's compensation, public liability, and automobile liability insurance and such other insurance as may be required by the laws of the state in which the Shipyard is located. The Contractor may also obtain other insurance against liabilities of the Contractor to any third person for any cause whatsoever. All insur-

ance required pursuant to instruction of the Commission shall at all times be maintained with companies, underwriters, or underwriting funds, in amounts and under forms of policies, satisfactory to the Commission.

The Contractor shall not be deemed to have warranted the validity or coverage of any such insurance. In the event that any of the insurance required by the Commission hereunder by reason of any act, omission, or negligence of the Contractor shall not be kept in full force and effect, the Contractor shall pay to the Commission all losses and indemnify the Commission against all claims and demands which would otherwise have been covered by such insurance.

Article 22. Injury to Employees. The Contractor shall indemnify and save harmless the United States, the Commission, and any other agency or instrumentality of the United States, and the Vessels, against all claims arising from injury to or death of employees, workmen, trespassers, licensees, and all other persons, whether in, on, or about the work to be performed hereunder or from damage to or loss of property, due to the act, neglect or default of the Contractor or subcontractors or their agents or employees; it being expressly understood that the workmen engaged upon the work on the Vessels to be constructed hereunder shall at all times be employees of the Contractor or subcontractors and not of the Commission.

Article 23. Patent Infringement. The Contractor shall be responsible for any and all claims made against the Commission or the Vessels for infringement of patents or patent rights or for the use of patented articles in connection with the work and material furnished by the Contractor, and shall defend, save harmless, and in-

demnify the United States, the Commission, and every agency or instrumentality of the United States, and the Vessels against all such claims and against all costs, expenses, charges, and damages which the said parties or any of them, may be obliged to pay by reason thereof, including expenses of litigation, if any; provided, however, that upon any such claim being made against said parties or any thereof, the Contractor will be promptly notified of such claim and also of any suit brought in connection therewith and will be given an opportunity to defend the same; and provided, that no payment on account of any such claim shall be made by the said United States, the Commission, or any other agency or instrumentality of the United States, unless either with the consent of the Contractor or pursuant to the decree of a proper court or tribunal.

Article 24. Covenant to Make Prompt Payment. The Contractor covenants that it will have and maintain at all times, sufficient working funds for the carrying out of its obligations hereunder, and will make prompt payment for all labor, materials, services, and other charges which are to be paid under this contract. [156]

Article 25. Labor Laws.

(a) The Contractor shall not employ any person undergoing sentence of imprisonment at hard labor.

(b) The Contractor will report monthly, and will cause all subcontractors to report in like manner, within 5 days after the close of each calendar month on forms to be furnished by the United States Department of Labor, the number of persons on their respective pay rolls, the aggregate amount of such pay rolls, the man-hours worked, and the total expenditures for materials. He shall fur-

nish to the Department of Labor the names and addresses of all subcontractors on the work at the earliest date practicable: Provided, however, That the requirements of this paragraph shall be applicable only for work at the site of the construction project.

(c) The Contractor and subcontractors at the site of the construction project will comply with the provisions of Public Act No. 324, 73d Congress, approved June 13, 1934, (48 Stat. 948) and with the provisions of the regulations issued by the Secretary of Labor thereunder, entitled "Regulations Applicable to Contractors and Subcontractors on Public Building and Public Work and on Building and Work Financed in Whole or in Part by Loans or Grants from the United States", published in the Federal Register March 1, 1941 as amended.

(d) This contract is subject to the provisions of the Act of June 25, 1936, (Public No. 814), entitled "An Act to provide more adequate protection to workmen and laborers on projects, buildings, constructions, improvements, and property wherever situated, belonging to the United States of America, by granting to the several States jurisdiction and authority to apply their State workmen's compensation laws on all property and premises belonging to the United States of America."

(e) The Contractor and its subcontractors shall pay all mechanics and laborers employed on work under this contract and directly upon the site of the work, unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account, the full amounts accrued at time of payment, computed at wage rates not less than those which may be determined by the Secretary of Labor pursuant to the provisions of the

Act approved March 3, 1931 (46 Stat. 1494) to be the prevailing rates for the various classes of such laborers and mechanics; and the scale of wages to be paid shall be posted by the Contractor in a prominent and easily accessible place at the site of the work. The Commission shall have the right to withhold from the Contractor and subcontractors so much of accrued payments as may be considered necessary by the Commission to pay to laborers and mechanics employed by the Contractor or any subcontractor on the work the difference between the rates of wages required by the contract to be paid laborers and mechanics on the work and the rates of wages received by such laborers and mechanics and not refunded to the Contractor, subcontractors or their agents. The Commission will furnish the Contractor with the wage scale determined by the Secretary of Labor as aforesaid, and until such wage scale is so furnished, the Contractor shall be under no obligations under the provisions of this paragraph.

Article 26. Eight-Hour Law. Until otherwise provided by law, provisions of law prohibiting more than 8 hours of labor in any one day of persons engaged upon work covered by this contract shall, in accordance with the provisions of the Act approved October 10, 1940 (Public No. 831, 76th Cong.), be suspended. The provisions of said Act approved October 10, 1940 are applicable to this contract.

Article 27. Prohibition against Employment of Certain Persons and against Discrimination. The Contractor shall not employ any person who [157] advocates, or who is a member of an organization that advocates, the overthrow of the Government of the United States by force

or violence to perform any part of the work under this contract, and as a condition to the employment of any person for the performance of such work, the Contractor shall, if the Commission so directs, require such person to execute and to file an affidavit in such form as to satisfy the requirements of Section 4 of Public Law No. 23 (77th Congress), approved March 27, 1941, but the execution and filing of such affidavit shall be without prejudice to the right of the Commission to require such further evidence in the premises as it may deem desirable. The Contractor agrees that in the performance of the work under this contract, it will not discriminate against any worker because of race, creed, color or national origin. (Executive Order No. 8802, approved June 25, 1941.)

Article 28. Fees. The Contractor warrants that he has not employed any person to solicit or secure this contract upon any agreement for a commission, percentage, brokerage, or fee, contingent or otherwise. Breach of this warranty shall give the Commission the right to terminate the contract, or, in its discretion, to deduct from the contract price or consideration the amount of such commission, percentage, brokerage, or fee. This warranty shall not apply to commissions payable by contractors upon contracts or sales secured or made through bona fide established commercial or selling agencies maintained by the Contractor for the purpose of securing business.

Article 29. Officials not to Benefit. No member of or delegate to Congress, nor Resident Commissioner, shall be admitted to any share or part of this contract or to any benefit that may arise therefrom, except as provided in Section 116 of the Act approved March 4, 1909, (35 Stats. 1109).

Article 30. Events of Default. The following shall constitute events of default under this contract:

(a) Failure of the Contractor in any respect to use due diligence in proceeding with the performance of the work required under this contract, or failure to perform any of the covenants on its part to be performed hereunder, provided that the Commission in either instance shall give notice to the Contractor as to such failure and Contractor shall not within thirty days after being so notified cure such failure.

(b) The filing by the Contractor or any of the undersigned individuals or the undersigned partnership or corporation of a petition in bankruptcy or for reorganization under the Bankruptcy Act or the entry of an order upon petition against the Contractor or any of the said individuals or said partnership or corporation adjudicating such Contractor, individuals, partnership or corporation or any of them a bankrupt, or the appointment of a receiver or receivers of the Contractor, said individuals, partnership or corporation or any of them or of any property belonging to the Contractor, said individuals, partnership or corporation necessary for the performance of its obligations under this agreement.

Article 31. Termination on Account of Default.

(a) Upon the occurrence of any of the events of default set forth in Article 30 hereof the Commission may terminate this contract and enter upon the Shipyard of the Contractor and take possession thereof as well as of any Vessels either completed or uncompleted and any machinery, materials, fittings, equipment and supplies theretofore or thereafter delivered at the Shipyard to be incorporated in the construction or the equipment of the

Vessels, or to be used in connection therewith, together with all plans, [158] specifications, calculations and other records required for the construction or equipment of the Vessels. In the event of termination pursuant to the provisions of this Article, the Commission may complete, or cause to be completed, all of the work to be performed upon the Vessels hereunder, and for such purpose, may take possession of so much of the Shipyard and the Contractor's plant, equipment, tools, machinery and appliances as may be necessary for the proper conduct of such work, and use and occupy the same without payment of rental or any other charge therefor until all of the work to be performed upon the Vessels has been completed.

In the event that this contract is terminated pursuant to the provisions of this Article, the Contractor shall not be entitled to receive any further payments from the Commission on account of the contract price with the exception of payments which have accrued under the provisions of paragraphs (a) and (c) of Article 15 prior to date of termination.

Articles 32. Optional Cancellation by the Commission.

(a) At any time prior to the completion of the work to be performed hereunder, the Commission may cancel this contract upon written or telegraphic notice to the Contractor, and upon the effective date of such cancellation the Contractor shall stop all work hereunder except as otherwise directed by the Commission. In the event of cancellation under this Article, the Commission shall pay to the Contractor the following amounts:

(1) The cost of work performed and materials, equipment and machinery acquired for use in any

Vessel whether or not completed and delivered other than costs which have been previously paid under the provisions of paragraph (a) of Article 15 of this contract.

(2) An amount equal to 10 percent of the cost of said work, materials, equipment and machinery or 6 percent of the contract price (as adjusted under the provisions of Article 5 and paragraph (a) of Article 6 to date of cancellation) multiplied by the percentage of the completion of the contract work, whichever amount shall be the lesser, less any payments previously made to the Contractor under the provisions of paragraphs (c) and (d) of Article 15 hereof.

(3) An amount equal to the cancellation fees, approved by the Commission, or charges paid by the Contractor in connection with the cancellation of any subcontract or other agreement for materials, machinery or equipment to be used or services to be performed in connection with the construction of the Vessels if the Commission shall have permitted the cancellation of such subcontracts or other agreements.

(4) Any other expenses of the Contractor in connection with the cancellation of this contract which are determined by the Commission to be necessary and reasonable.

(b) If this contract is cancelled pursuant to the provisions of this Article, the Commission shall permit the Contractor to cancel all subcontracts or other agreements theretofore entered into by the Contractor for the mate-

rials, machinery or equipment to be used or services to be performed in connection with the construction of the Vessels except in those cases where the continued performance of such subcontract or other agreements is necessary for the completion of work which the Commission directs the Contractor to perform or where the Commission offers to take over and perform the Contractor's obligations under such subcontracts or other agreements. [159]

Article 33. Loss of or Damage to Vessels. If there shall be an actual loss of any Vessel prior to its delivery to the Commission, or if any Vessel shall be so damaged that in the determination of the Commission work thereon should be abandoned, the Commission may, at its option, either require the Contractor to construct another vessel as a replacement for the Vessel so lost or destroyed or modify this contract so as to relieve the Contractor of its obligation to deliver the Vessel so lost or damaged. In either case, payments made under the provisions of paragraphs (a) and (c) of Article 15 hereof on account of the Vessel so lost or damaged shall be disregarded in determining the amount of payment to which the Contractor is entitled under the provisions of paragraph (d) of said Article 15. In the event that the Commission requires the Contractor to construct a replacement vessel as aforesaid, no adjustment will be made in the contract price on account of such replacement. In the event, however, that the Contractor is, pursuant to the provisions of this Article, relieved of its obligations to deliver any Vessel, the contract price stated in Article 4 shall be reduced by an amount equal to such price divided by the number of Vessels to be constructed hereunder, and the maximum

amount payable under the provisions of paragraph (d) of Article 15 shall be reduced in the same proportion.

Article 34. Arbitration. Notwithstanding any other provisions to the contrary, in any case where this agreement provides that determination by the Commission of a question of fact shall be final or conclusive, the Contractor may, within 10 days after the making of such determination, give notice to the Commission of its appeal therefrom. Questions of fact with respect to which an appeal is so taken shall be referred to arbitrators, the Commission and the Contractor each designating one and the two thus appointed, in case of disagreement, designating a third as umpire. The arbitrators shall give prompt notice to both parties of their determinations of such questions of fact, which shall thereupon supersede the determinations of the Commission and shall be binding upon the Commission and the Contractor.

Article 35. Renegotiation. This contract is subject to the provisions of Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, and the Contractor hereby agrees that (1) the contract price may be renegotiated pursuant to said Section 403 at a period when the profits derived hereunder can be determined with reasonable certainty; (2) any amount of the contract price which is found as a result of such renegotiation to represent excessive profits and an amount of the contract price equal to the amount of reduction in contract price of any subcontract under this contract pursuant to renegotiation of such subcontract as hereafter provided will be repaid to the Commission or may be retained by the United States; and (3) the Contractor will insert in each subcontract for an amount in excess of \$100,000 made

by the Contractor hereunder (i) a provision for renegotiation by the Chairman of the Commission and the subcontractor of the contract price of such subcontract at a period when the profits can be determined with reasonable certainty, (ii) a provision for the retention by the United States or the repayment to the United States of any amount of the contract price which is found as a result of such renegotiation to represent excessive profits, and (iii) a provision for relieving the Contractor from any liability to the subcontractor on account of any amounts so retained by or repaid to the United States.

The liability of the Contractor hereunder to make repayments of any amounts on account of a reduction in any subcontract price under this Article shall be limited to the amount unpaid by the Contractor to the subcontractor under such subcontract plus an amount, if any, equal to payments made to such subcontractor subsequent to the receipt of a notice from said Chairman to retain said payments. [160]

Article 36. Effect of this Contract. Said Tavares Construction Company, Inc. and the partnership of Stroud and Seabrook, as well as the members of such partnership, and C. M. Elliott shall be jointly and severally bound hereunder and all of said individuals and said corporation and said partnership shall be bound by the acts or representations of any one of said individuals, said corporation, said partnership or the members thereof, and payment by the Commission to any one shall constitute payment to all of them. Wherever reference is made herein to the "Contractor" it shall mean said individuals, said partnership, the members of said partnership and said corporation, both as individuals and as joint ventures.

In Witness Whereof, the parties hereto have executed this agreement as of the day and year first above written.
(Seal)

UNITED STATES MARITIME COMMISSION

By: E. S. LAND

Chairman

Attest:

A. J. WILLIAMS

Asst. Secretary.

(Seal)

TAVARES CONSTRUCTION COMPANY, INC.

By: CARLOS TAVARES

President

Attest:

DON F. GATES

Secretary

STROUD AND SEABROOK

By: LLOYD S. STROUD

Lloyd S. Stroud

(Individually and as a partner)

By: R. S. SEABROOK

R. S. Seabrook

(Individually and as a partner)

C. M. ELLIOTT

Approved as to form:

WADE H. SKINNER

General Counsel

U. S. Maritime Commission [161]

Addendum No. 1

Contract No. MCc-7913

This Agreement, made and entered into as of the 5th day of November, 1942, by and between the United States Maritime Commission (herein called the "Commission") and Tavares Construction Company, Inc., a corporation organized and existing under the laws of the State of California, Lloyd S. Stroud and R. S. Seabrook, individually and as the partnership of Stroud and Seabrook, and C. M. Elliott, said corporations and persons being joint venturers doing business under the name of Concrete Ship Constructors and being hereinafter referred to as the "Contractor";

Whereas:

1. Under date of June 30, 1942 the Contractor and the Commission entered into a contract (herein called the "Vessel Contract") for the construction by the Contractor of seventeen concrete barges in accordance with the terms and conditions of such contract;

2. The Vessel Contract provided that the Contractor would obtain certain shipyard facilities under an agreement with Defense Plant Corporation and that the Commission would reimburse the Contractor for certain payments to be made by the Contractor to Defense Plant Corporation under the terms of said agreement;

3. The Navy Department has acquired the land on which some of the aforementioned additional shipyard facilities were to be constructed, and the Commission has caused eminent domain proceedings to be brought to acquire a new site for such shipyard facilities, as well as the site of certain shipyard facilities heretofore acquired by the Contractor;

4. As a result of the change in the site of the proposed additional shipyard facilities, the cost thereof will be increased with a resulting increase in the Contractor's obligations to Defense Plant Corporation; and

5. The parties to the Vessel Contract desire to amend such contract so as to make certain charges therein necessitated by the aforementioned change in the cost of said additional shipyard facilities. [162]

Now Therefore, in consideration of the premises, the parties hereto agree to amend the Vessel Contract so as to delete the last sentence of Article 2 thereof and substitute in lieu of such sentence a sentence reading as follows:

"In addition to the payments provided for in Article 2 of the contract between the Contractor and the Commission dated November 27, 1941 (Contract No. MCc-1879) and those provided for in Article 15 hereof, the Commission will reimburse the Contractor for any and all rental payments made during the term of this contract to Defense Plant Corporation pursuant to the aforementioned agreement to be made by the Contractor with such corporation, but in no event shall the obligation of the Commission to make payments under this Article exceed the sum of \$94,375 per vessel delivered under the terms of this contract, plus such amount as may subsequently be added thereto under any agreement between the Contractor and Defense Plant Corporation for the sole purpose of reimbursing Defense Plant Corporation for the cost of the site of said shipyard facilities if such costs shall be paid by Defense Plant Corporation to the Commission."

Except as hereinbefore otherwise expressly provided, all the terms and conditions of the Vessel Contract shall remain in full force and effect.

In Witness Whereof, the parties hereto have executed this agreement as of the day and year first above written.

UNITED STATES MARITIME COMMISSION

By: E. S. Land (signed)

Chairman

Attest:

A. J. Williams (signed)

Assistant Secretary

TAVARES CONSTRUCTION COMPANY, INC.

By: (signed)

President

Attest:

Don F. Gates (signed)

Secretary

STROUD AND SEABROOK

By: Lloyd S. Stroud (signed)

LLOYD S. STROUD

(Individually and as a partner)

By: R. S. Seabrook (signed)

R. S. SEABROOK

(Individually and as a partner)

By: C. M. Elliott (signed)

C. M. ELLIOTT

Approved as to form:

Wade H. Skinner (signed)

General Counsel

U. S. Maritime Commission [163]

Addendum No. 2

Contract No. MCc-7913

This Agreement, made and entered into as of the 24th day of December, 1942, by and between the United States Maritime Commission (hereinafter called the "Commission") and Tavares Construction Company, Inc., a corporation organized and existing under the laws of the State of California, Lloyd S. Stroud and R. S. Seabrook, individually and as the partnership of Stroud and Seabrook, and C. M. Elliott, said corporations and persons being joint venturers doing business under the name of Concrete Ship Constructors and being hereinafter referred to as the "Contractor";

Whereas:

1. Under date of June 30, 1942 the Commission and the Contractor entered into a contract (herein called the "Vessel Contract") for the construction by the Contractor for the Commission of seventeen concrete barges;

2. Under the terms of such contract the Commission agreed to reimburse the Contractor for certain rental payments to be made in connection with the acquisition by the Contractor through Defense Plant Corporation of certain additional shipyard facilities required in connection with the construction of said barges; and

3. The Contractor has requested the Commission to increase its obligation to make reimbursements for rental

payments and has agreed, in consideration of such increase in said obligation, to reduce certain of the fees payable to it under the Vessel Contract.

Now, Therefore, the parties hereto agree as follows:

Article 1. The Vessel Contract is hereby amended in the following respects:

(1) The figure "\$77,260" appearing in Article 2 thereof shall read "\$127,000".

(2) The figure "\$11,781,000" appearing in Article 4 shall read "\$11,696,000", and the figure "\$693,000" appearing in such Article shall read "\$688,000". [164]

(3) Wherever the figure "\$9,450" appears in paragraph (c) of Article 15 of the Vessel Contract, such figure shall read "\$8,200".

(4) The figure "\$749,700" appearing in paragraph (d) of Article 15 of the Vessel Contract shall read "\$664,700".

Article 2. Except as hereinbefore otherwise expressly provided, all the terms and conditions of the Vessel Contract shall remain in full force and effect.

In Witness Whereof, the parties hereto have executed this agreement as of the day and year first above written.
(Seal)

UNITED STATES MARITIME COMMISSION

By: E. S. LAND

Chairman

Attest:

A. J. WILLIAMS

Assistant Secretary

(Seal)

TAVARES CONSTRUCTION COMPANY, INC.

By: CARLOS TAVARES

President

Attest:

DON F. GATES

Secretary

STROUD AND SEABROOK

By: LLOYD S. STROUD

Lloyd S. Stroud

(Individually and as a partner)

By: R. S. SEABROOK

R. S. Seabrook

(Individually and as a partner)

By: C. M. ELLIOT

C. M. Elliot

Approved as to form:

WADE H. SKINNER

General Counsel

U. S. Maritime Commission [165]

Contract No. MCc-7913

Addendum No. 4

This Agreement, made and entered into as of the 30th day of September, 1943, by and between the United States Maritime Commission (herein called the "Commission") and Tavares Construction Company, Inc., a corporation organized and existing under the laws of the State of California, Lloyd S. Stroud and R. S. Seabrook, individually and as the partnership of Stroud and Seabrook, and C. M. Elliott, said corporations and persons being joint venturers doing business under the name of Concrete Ship Constructors and being hereinafter referred to as the "Contractor";

Whereas:

1. Under date of June 30, 1942, the Commission and the Contractor entered into a contract (herein called the "Vessel Contract") for the construction of certain vessels by the Contractor for the Commission;

2. Under the terms of the Vessel Contract the Commission agrees to make payments to the Contractor on the basis of the costs incurred by it in the performance of the work thereunder, including the cost of any insurance premiums paid by the Contractor;

3. The Commission desires to assume the risk of loss arising out of certain third party liabilities which may from time to time be incurred by the Contractor during the performance of the contract work; and

4. The parties hereto desire to amend the Vessel Contract to provide for such assumption of risk of loss by the Commission and to make appropriate provisions for adjustment in the contract price on account of the fact

that the Contractor will not have to pay certain insurance premiums.

Now, Therefore, the parties hereto agree to amend Article 21 of the Vessel Contract so that it shall read as follows:

“Article 21. The Contractor may, in its discretion, and shall, if and as required by the Commission, secure fidelity and other similar bonds, workmen’s compensation, public liability, property damage and automobile liability insurance and such other insurance as may be required by the laws of the State in which the Shipyard is located. The Contractor may also obtain other insurance against liabilities of the Contractor to any third person for any cause whatsoever except liabilities adequately covered by insurance provided by the Commission for benefit of itself and the Contractor or as otherwise hereinafter expressly provided. The Contractor shall also secure such other insurance as the Commission may direct or approve.

“The Commission has requested the Contractor not to obtain Protection and Indemnity insurance or other insurance against claims and liabilities for damage to or loss of property of third parties, personal injury to or death of persons (other than employees of the Contractor) occurring in connection with or during the operation or movement of any Vessel away from the Shipyard, and the Contractor shall not, in connection with movement or operation of any Vessel launched subsequent to February 28, 1943, obtain insurance against such liabilities and claims. The Commission hereby agrees, subject to the terms and

conditions of this paragraph, to indemnify and hold the Contractor harmless from liabilities and claims which may occur as a result of damage to or loss of property of third parties, personal injury to or death of persons (other than employees of the Contractor) in connection with the operation or movement of any such Vessel as aforesaid prior to the delivery thereof under this contract irrespective of whether the liability arises from negligence [166] of the Contractor, its agents, servants or employees to the extent such liabilities are not covered by insurance carried by the Contractor. The obligation of the Commission hereunder shall include the payment of reasonable legal and other expenses and court costs arising from a claim or purported claim for damage to or loss of property of third parties, personal injury or death as aforesaid and for the amount of any judgment or settlement made on account of such a claim if the Contractor shall (1) follow such instructions as the Commission may from time to time issue in respect to the handling of such claims and actions and the employment of counsel in connection therewith, (2) permit the Commission to defend any action which may be brought in its own name or in that of the Contractor and (3) not make any settlement of any such claim without the prior approval of the Commission or its duly authorized representative.

"The term 'vessel property' shall include (i) all undelivered Vessels and delivered Vessels on which work is being performed under an agreement between the parties hereto dated February 18, 1943, whether completed or uncompleted, and all materials,

machinery, equipment and other items of personal property to be used for or in connection with the construction of the Vessels, title to which is in the Commission or the United States, represented by the Commission, (ii) all machinery, equipment or other items of personal property delivered to the Contractor for installation on the vessels, title to which is in the United States, represented by the Navy Department, or any other agency or instrumentality of the United States, and (iii) all machinery, equipment and materials the cost of which has been or will be paid to the Contractor under the terms of this contract and delivery of which has been made to the Contractor either at the site of the performance of the contract work or elsewhere. The Commission has requested the Contractor not to carry or to incur the expense of any insurance against any risk of loss of or damage to any vessel property unless the Commission shall in writing direct the Contractor to insure such property and then only to the extent and in the manner directed. The Commission accordingly assumes all risk of loss of or damage to the vessel property to the extent that such risk of loss has not been covered by insurance pursuant to written direction of the Commission and shall not hold the Contractor liable for any such loss of or damage to such property, irrespective of the cause of the risk thereof and whether or not caused by the negligence, whatsoever its degree, of the Contractor, its agents, servants, subcontractors, employees or otherwise, to the extent that the risks thereof are of the types covered by usual forms of pre-keel and post-keel laying full builder's risk insurance, war risk insurance

and other customary forms of insurance. The risk of loss and damage assumed by the Commission hereunder shall include, but not be limited to, those covered by (i) Marine Builder's Risk (Navy Form Syndicate) policy, including the rider attached to the "Free of Capture and Seizure" clause thereof and (ii) War Damage Policy, both as set forth in the pamphlet entitled "Standard Forms of Marine Builder's Risks (Navy Form Syndicate) and War Damage Insurance Policy Referred to in Vessel Contracts of the Bureau of Ships" published by the Navy Department under date of November 23, 1942.

"All insurance required pursuant to instruction of the Commission shall at all times be maintained with companies, underwriters or underwriting funds, in amounts and under forms of policies, satisfactory to the Commission.

"The Contractor shall not be deemed to have warranted the validity or coverage of any such insurance. In the event that any [167] of the insurance required by the Commission hereunder by reason of any act, omission or negligence of the Contractor shall not be kept in full force and effect, the Contractor shall pay to the Commission all losses and indemnify the Commission against all claims and demands which would otherwise have been covered by such insurance. Approval by the Commission or its authorized representative of policies taken out by the Contractor at the direction of the Commission shall establish the Contractor's compliance hereunder with the requirements of the Commission.

“Payments made by the Commission to the Contractor, either on account of liabilities incurred by the Contractor or on account of the cost of replacing or repairing vessel property lost or damaged, shall not be taken into account in determining the amount of payment to be made by the Commission to the Contractor under the provisions of paragraph (d) of Article 15 of this contract.

“The obligation of the Contractor to insure against risk of loss of or damage to any shipyard facilities owned by the United States, represented by the Commission, shall be those specified in the contract under which such facilities were constructed, as amended to date hereof, and nothing contained in this contract shall be construed as imposing any obligations upon the Contractor to insure such shipyard facilities or any liability in the event of loss or damage other than those specified in said contract for the construction of such shipyard facilities.”

Article 2. The contract price stated in Article 4 of the Vessel Contract shall be reduced by an amount equal to 110 per cent of the estimated cost of premiums on insurance against risk of loss or damage, including third party liabilities assumed by the Commission under the terms of this amendatory agreement and not assumed by it under the Vessel Contract or any amendments previously made thereto.

This agreement shall be effective as of the date thereof, and any additional liabilities assumed by the Commission under the provisions of Article 21 of the Vessel Contract as hereby amended shall be applicable only to claims

and actions arising out of events occurring on or after such date.

In Witness Whereof, the parties hereto have executed this agreement as of the day and year first above written.
(Seal)

UNITED STATES MARITIME COMMISSION

By: E. S. LAND

Chairman

Attest:

A. J. WILLIAMS

Secretary

(Seal)

TAVARES CONSTRUCTION COMPANY, INC.

By: CARLOS TAVARES

President

Attest:

DON F. GATES

Secretary

STROUD AND SEABROOK

By: LLOYD S. STROUD

Lloyd S. Stroud

(Individually and as a partner)

By: R. S. SEABROOK

R. S. Seabrook

(Individually and as a partner)

C. M. ELLIOTT

C. M. Elliott

Approved as to form:

WADE H. SKINNER

General Counsel

U. S. Maritime Commission [168]

EXHIBIT 6

Contract No. MCc-25348

This Agreement, made and entered into as of the 30th day of November, 1943, by and between the United States Maritime Commission (herein called the "Commission") and Tavares Construction Company, Inc., a corporation organized and existing under the laws of the State of California, Lloyd S. Stroud and R. S. Seabrook, individually and as a partnership of Stroud and Seabrook, and C. M. Elliott, Carlos Tavares, Henry M. Page, and Don F. Gates, said corporations and persons being joint venturers doing business under the name of Concrete Ship Constructors (herein called the "Cotractor");

Whereas:

1. Under dates of November 27, 1941 and June 30, 1942, the Contractor and the Commission entered into two contracts (herein called the "Vessel Contracts") for the construction by the Contractor for the Commission of an aggregate of twenty-two concrete barges;

2. The Vessel Contracts provided for the payment to the Contractor, as consideration for the performance of work thereunder, of an amount equal to the costs of such work determined in the manner therein set forth and a fee therein provided for, and the parties hereto desire to provide that there shall be paid, in lieu of such compensation, a lump-sum amount subject to the adjustments hereinafter provided for;

3. Under the provisions of Public Law 46 (77th Congress), approved May 2, 1941, the Commission is authorized, upon its determination that such action is in the best interests of national commerce and defense, be-

cause of changes in conditions occurring after the execution of its contracts theretofore or thereafter entered into for the construction of vessels, to modify such contracts in conformity with the provisions of said law and to adjust the payments to be made thereunder; and

4. The Commission has determined that it is in the best interests of national commerce and defense to modify the Vessel Contracts so as to provide for the payment of such lump-sum amount upon the conditions hereinafter set forth.

Now, Therefore, the parties hereto agree as follows:

Article 1. In lieu of the payments provided for in the Vessel Contracts, the Commission shall pay to the Contractor the sum of \$30,515,208 (herein called the "contract price") as full consideration for the performance of such contracts.

Article 2. (a) Except as otherwise provided in paragraph (b) of Article 3, hereof, all amounts heretofore or hereafter paid under the provisions of the Vessel Contracts shall be considered partial payments of said contract price and to the extent thereof to have discharged the Commission's obligations in respect to the payment of such price.

(b) The remainder of the contract price shall be payable as follows:

(1) Partial payments shall be made by the Commission to the Contractor as the work progresses, at the end of each calendar month or as soon thereafter as practicable; Provided, however, that such payments shall not exceed in the aggregate 96 per cent of the value (as represented by the contract

price) of the work done and materials delivered to the yard for the construction of the Vessels, and provided, further, that the Commission may, on such terms and conditions as it may prescribe, include, as part of the value of the work done on the Vessels work performed by any subcontractor on materials, machinery or equipment to be installed in the Vessels, even though such subcontractor has not made delivery thereof [169] at the yard or plant of the Contractor or completed the work required of him with respect thereto if the title to such materials, machinery or equipment included as part of the value of the work done on the Vessels shall have vested in the Commission.

(2) The Commission may, on such terms and conditions as it may prescribe, make payment to the Contractor of the full contract price, including retained percentages less authorized reductions for each Vessel completed and accepted hereunder on the basis of \$1,387,054 per Vessel.

(3) The remainder of the contract price shall be payable to the Contractor upon the completion of all the work to be performed hereunder provided that if the Commission shall at such time have determined that the Contractor will have an obligation to make payments to it under the provisions of Article 4 hereof, the Commission may withhold from such payment an amount not to exceed that which it has then determined that the Contractor is obligated to pay under the provisions of said Article 4.

Article 3. (a) In addition to the payments of the contract price specified in the preceding Article 2, the

Commission will reimburse the Contractor for those rentals which are paid by the Contractor to Defense Plant Corporation and are reimbursable pursuant to the provisions of Article 2 of each of the Vessel Contracts and will also pay the Contractor an amount equal to any taxes validly assessed against the shipyard facilities of the Contractor or any interests of the Contractor therein to the extent that such taxes become payable during the performance of the work hereunder or under the Vessel Contracts if such taxes shall have not been heretofore reimbursed to the Contractor under the provisions of the Vessel Contracts.

(b) The contract price stated in Article 1, hereof, does not include any amount for Workmen's Compensation Insurance Premiums. The Commission will pay to the Contractor an amount equal to the cost of Workmen's Compensation Insurance Premiums in addition to the contract price; such payment to be made on the basis of the cost incurred; and no such payment heretofore or hereafter made to be considered a payment on account of the contract price stated in Article 1, hereof. It is understood and agreed, however, that any payment made under the Vessel Contracts on account of the cost of Workmen's Compensation Insurance Premiums shall discharge to the extent thereof the Commission's obligation to make payment under this Article. Any refunds or dividends made by the Workmen's Compensation insurer shall be paid to the Commission or credited to such costs reimbursable as aforesaid, and if upon the completion of the work to be performed under the Vessel Contracts the Commission so requests, the Contractor will assign to the Commission the Workmen's Compensation insurance policies obtained by it in connection with the per-

formance of such work, including the right to receive any refunds of premiums or dividends.

(c) There shall be deducted from the contract price payable to the Contractor an amount equal to (i) any City and County taxes or rental of the shipyard site or any part thereof included in the amount paid to the Contractor under the Vessel Contracts and later refunded to the Contractor and (ii) the difference between \$71,000 and such amount as shall be paid in final settlement of a claim of Fairbanks, Morse & Co. on account of the termination of a subcontract designated Order No. N-47 entered into by the Contractor with such company.

(d) In the event that the labor rates for shipyard labor established by the Zone Standards Agreement shall, subsequent to the date of this agreement be increased, the contract price shall be increased by an amount equal [170] to the actual net increase in the cost of the performance of the work under the Vessel Contracts due to such change as determined by the Commission.

Article 4. The Contractor agrees:

(1) To make a report under oath to the Commission upon completion of this contract, setting forth in the form prescribed by the Commission the total contract price, the total cost of performing this contract, the amount of Contractor's overhead charged to such cost, the net profits and the percentage such net profits bears to the contract price, and such other information as the Commission shall prescribe;

(2) To pay to the Commission profit, as shall be determined by the Commission, in excess of \$750,00 of the contract price: Provided, That, if such amount is

not voluntarily paid, the Commission shall determine the amount of such excess profit and collect it in the same manner that other debts due the United States may be collected;

(3) That the books, files, and all other records of the Contractor, or any holding, subsidiary, affiliated, or associated company, shall at all times be subject to inspection and audit by any person designated by the Commission, and the premises, including the Vessel, of the Contractor, shall at all times be subject to inspection by the agents of the Commission.

It is understood and agreed that the provisions of this Article shall not apply to contracts or subcontracts for scientific equipment used for communication and navigation as may be so designated by the Commission.

The requirement of payment by the Contractor to the Commission of profits as provided in this Article is contractual and shall in effect constitute a reduction in the contract price payable by the Commission as finally determined hereunder. The method of accounting for profits and the determination of costs incurred by the Contractor shall, however, be in accordance with the requirements of Section 505(b) of the Merchant Marine Act of 1936 and the applicable regulations of the Commission issued thereunder.

Article 5. (a) Title to all materials, supplies and equipment purchased by the Contractor for use in the performance of work under the Vessel Contracts, irrespective of whether such items shall actually be used in the performance of such work under such contract, shall vest in the Commission, and in the event that any such items are not so used, the Commission may remove them from the shipyard of the Contractor.

(b) Included in the contract price specified in Article 1 hereof was the amount of rentals paid or to be paid by the Contractor for shipyard equipment under rental agreements which provided for the vesting of title to the rented equipment in the Commission when the rental paid thereunder equalled the replacement value of the equipment as of the beginning of the rental period or for an option in the Contractor to purchase such equipment and apply the rentals paid to the purchase price. In the event that prior to the completion of the work hereunder the Contractor may, in consideration of the rentals paid, acquire any item of equipment rented as aforesaid, it shall acquire such title and deliver the item of equipment so acquired to the Commission upon the completion of the work hereunder, subject, however, to the Contractor's right to use such item as provided for in any other contract or agreement between the Contractor and the Commission.

Article 6. Each of the Vessel Contracts is amended so as to delete therefrom Article 6, Article 9, Article 14, Article 15 and Article 16 thereof. Except and to the extent that they are inconsistent with the terms of [171] this agreement, the other terms and conditions of the Vessel Contracts shall remain in full force and effect and shall be applicable to the performance of the work called for thereunder.

In Witness Whereof, the parties hereto have executed this agreement as of the day and year first above written.
(Seal)

UNITED STATES MARITIME COMMISSION

By: E. S. LAND

Chairman

Attest:

R. L. McDONALD

Asst. Secretary

(Seal)

CONCRETE SHIP CONSTRUCTORS

TAVARES CONSTRUCTION COMPANY, INC.

By: CARLOS TAVARES

President

Attest:

DON F. GATES

Secretary

STROUD AND SEABROOK

By: LLOYD S. STROUD

Lloyd S. Stroud

(Individually and as a partner)

By: R. S. SEABROOK

R. S. Seabrook

(Individually and as a partner)

C. M. ELLIOTT

C. M. Elliott

CARLOS TAVARES

Carlos Tavares

HENRY M. PAGE

Henry M. Page

DON F. GATES

Don F. Gates

Approved as to form:

WADE H. SKINNER

General Counsel

U. S. Maritime Commission

[Endorsed]: Filed Dec. 23, 1944. Edmund L. Smith,
Clerk. [172]

In the District Court of the United States in and for the
Southern District of California

Southern Division

No. 248-SD Civil

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CERTAIN PARCELS OF LAND IN THE CITY OF
NATIONAL CITY, COUNTY OF SAN DIEGO,
STATE OF CALIFORNIA; TAVARES CON-
STRUCTION COMPANY, INC., a Corporation;
THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, a Corporation; SAN
FRANCISCO BRIDGE COMPANY, a Corporation;
LEONARD McLAUHLIN, Individually, and Doing
Business Under the Name and Style of McLAUHLIN
WATER TAXI COMPANY; CARL A. JOHNSON;
PEARL JOHNSON; SANTA FE LAND IM-
PROVEMENT COMPANY, a Corporation; SAN
DIEGO AND ARIZONA EASTERN RAILWAY
COMPANY, a Corporation; CITY OF NATIONAL
CITY, a Municipal Corporation; COUNTY OF SAN
DIEGO, a Body Politic and Corporate; STATE OF
CALIFORNIA, a Corporation Sovereign, et al.,

Defendants.

DECREE ON AMENDED DECLARATION OF
TAKING

Comes now the plaintiff, United States of America, by
Eugene D. Williams, Special Assistant to the Attorney
General of the United States of America, and Wm. J.
Adams, Special Attorney, Lands Division, Department

of Justice, and moves the Court to enter a Decree on Amended Declaration of Taking filed in the above entitled action on December 23, 1944, [173] and upon consideration of the Complaint in Condemnation on file herein, the said Amended Declaration of Taking, and the statutes in such cases made and provided, the Court finds and decrees as follows:

First: That the United States is entitled to acquire property by eminent domain for the purposes as prayed for in said Complaint;

Second: That said Complaint was filed at the request of the United States Maritime Commission, acting by and through E. S. Land, Chairman of the United States Maritime Commission, the authority empowered by law to acquire the property described in said Complaint, and also under the authority of the Attorney General of the United States;

Third: That said Complaint in Condemnation and Amended Declaration of Taking state the authority under which, and the public use for which, said property was taken; that the United States Maritime Commission is duly authorized and empowered by law to acquire property such as is described in the Complaint, for the public use as provided for in the Acts of Congress hereinafter set forth, and that the Attorney General of the United States is the person authorized by law to direct the institution of such condemnation proceedings;

Fourth: That a proper description of the lands sought to be taken, sufficient for identification, is set out in said Amended Declaration of Taking;

Fifth: That a statement of each estate or interest in said lands taken for said public use is set out in said Amended Declaration of Taking;

Sixth: That a plat or plan showing the lands taken is annexed to and incorporated in said Amended Declaration of Taking;

Seventh: That a statement is contained in said Amended Declaration of Taking, and set forth in Schedule "B" annexed thereto, of a sum of money estimated by said acquiring authority to be just compensation for the taking of said lands, in the amount of One Hundred Seventy-one Thousand, Six Hundred and Fifty Dollars (\$171,650.00), and that said sum was deposited in the Registry of this Court for the use of the persons entitled thereto, upon and at the time [174] of the filing of the said Declaration of Taking No. 1 and of said Amended Declaration of Taking;

Eighth: That there is a statement in said Amended Declaration of Taking that the estimated ultimate award of compensation for the taking of said lands, in the opinion of the United States Maritime Commission, will be within the limits prescribed by Congress to be paid as a price therefor.

And the Court having fully considered said Complaint in Condemnation, the Amended Declaration of Taking, and the statutes in such cases made and provided, is of the opinion that the United States of America is entitled to take the property hereinafter described and to have the estate or interest hereinafter set forth vested in it pursuant to and in accordance with the Act of Congress approved February 26, 1931 (46 Stat. 1421, 40 U. S. C. A., Sec. 258a), and Acts supplementary thereto and

amendatory thereof, and under the further authority of the Act of Congress approved August 25, 1941 (Public Law 247—77th Congress), the Act of Congress approved March 5, 1942 (Public Law 474—77th Congress), the Merchant Marine Act of 1936, as amended, and the Act of Congress approved March 27, 1942 (Public Law 507—77th Congress).

It Is Therefore Ordered, Adjudged and Decreed that the fee simple title to the lands hereinafter described, excepting, however, all of the right, title and interest of the United States of America or its agent, Defense Plant Corporation, in and to said real estate, including all improvements and fixtures located thereon or in any way appertaining thereto, which have heretofore vested in the United States or its agent, Defense Plant Corporation, by virtue of the following instruments: Agreement dated December 27, 1941, between the Defense Plant Corporation and the Tavares Construction Company, Inc.; Agreement dated November 27, 1941, between the United States Maritime Commission and the Tavares Construction Company, Inc.; Lease Agreement dated January 1, 1942, between the City of National City and the Tavares Construction Company, Inc., and assignment thereof to the Defense Plant Corporation, dated January 30, 1942; Agreement dated October 26, 1943, between the United States Maritime Commission and the Tavares Construction Company, Inc.; Agreement dated June 30, 1942, between the United States Maritime Commission and the Tavares Construction Company, [175] Inc.; Agreement

dated November 30, 1943, between the United States Maritime Commission and the Tavares Construction Company, Inc., a copy of each of which said agreements is attached to the said Amended Declaration of Taking, and to which reference is hereby made for further particulars, be and hereby is vested in the United States of America, and said lands are deemed to be condemned and taken, and are condemned and taken, for the use of the United States of America, and the right to just compensation for the same is vested in the persons entitled thereto when said compensation shall be ascertained and awarded in this proceeding and established by judgment thereunder pursuant to law.

The lands so condemned and taken are particularly described upon the sheets hereto annexed marked Schedule "A" and by this reference made a part hereof.

Nothing herein is to be considered as a determination by the Court that the estimate of the United States Maritime Commission, or the amount deposited, is or is not just compensation for the taking by the plaintiff of the herein described property.

This cause is held open for such other and further orders, judgments, and decrees as may be necessary in the premises.

Dated: This 27th day of December, 1944, at 10:30 o'clock A. M.

PAUL J. McCORMICK

United States District Judge

Presented by:

EUGENE D. WILLIAMS

Special Assistant to the Attorney General

WM. J. ADAMS

Special Attorney, Lands Division

Department of Justice

By Eugene D. Williams

Attorneys for Plaintiff [176]

SCHEDULE "A"

Those Certain Parcels of Land in the City of National City, County of San Diego, State of California, More Particularly Described as Follows:

Parcel 1. [Description not printed as it is same as set forth in Complaint on page 6.]

Parcel 2. [Description not printed as it is same as set forth in Complaint on page 7.]

Parcel 3. [Description not printed as it is same as set forth in Complaint on page 7.] [177]

Parcel 4. [Description not printed as it is same as set forth in Complaint on page 8.] [178]

Parcel 5. [Description not printed as it is same as set forth in Complaint on page 9.]

Parcel 6. [Description not printed as it is same as set forth in Complaint on page 10.] [179]

Parcel 7. [Description not printed as it same as set forth in Complaint on page 10.]

Parcel 8. [Description not printed as it is same as set forth in Complaint on page 11.] [180]

Parcel 9. [Description not printed as it is same as set forth in Complaint on page 11.]

Parcel 10. [Description not printed as it is same as set forth in Complaint at page 12.] [181]

Parcel 11. [Description not printed as it is same as set forth in Complaint on page 13.] [182]

PARCEL "A"

That portion of the tidelands lying between the U. S. Bulkhead Line and Pierhead Line of San Diego Bay, National City, County of San Diego, California, described as follows:

[Description not printed as it is same as set forth in Amendment to Complaint on page 24.]

Judgment entered Dec. 27, 1944. Docketed Dec. 27, 1944. Book 10, page 44. Edmund L. Smith, Clerk, by B. B. Hansen, Deputy.

[Endorsed]: Filed Dec. 27, 1944. Edmund L. Smith, Clerk. [183]

[Title of District Court and Cause]

AMENDED AND SUPPLEMENTAL COMPLAINT
IN CONDEMNATION [184]

Comes now the plaintiff, United States of America, by Eugene D. Williams, Special Assistant to the Attorney General, and Wm. J. Adams, Special Attorney, Lands Division, Department of Justice, as its attorneys, on application of the duly authorized officer of the United States, hereinafter referred to as the "requesting officer," and under the direction and by the authority of the Attorney General of the United States, and by leave of Court first had and obtained, files its Amended and Supplemental Complaint herein, and for cause of action against the above named defendants, and each of them, complains and alleges:

I.

That the plaintiff, United States of America, is entitled to acquire by the exercise of its power of eminent domain, pursuant to the statutes hereinafter set forth, the property hereinafter described for the uses and purposes hereinafter set forth.

II.

That in accordance with the provisions of said statutes, said requesting officer, for and in behalf of the United States, has designated and determined that the property hereinafter described is suitable and necessary for the purposes of the United States, and has selected such property for acquisition by the United States in these proceedings, and said selection, designation, and determination ever since have been and now are in full force and effect; that the purposes for which the plaintiff is taking

said property as hereinafter alleged are necessary and constitute a public use, which use is authorized by law; that the acquisition thereof by plaintiff is, and will be, of greatest public benefit and to the least private injury; that plaintiff is informed and believes, and upon such information and belief alleges, that no part of said property has heretofore been appropriated to any public use, and if any part or portion thereof has heretofore been appropriated to a public use, the use to which said property is herein sought to be condemned and appropriated is a more necessary and paramount public use.

III.

That plaintiff is informed and believes, and upon such information and belief alleges, that each parcel of property hereinafter described consti- [185] tutes a whole parcel and not a part thereof, except where otherwise designated herein.

IV.

That plaintiff has named herein by their true names, or by fictitious names, all defendants known or believed by it to have some interest in said property; that there may be other persons having some interests therein whom the plaintiff hereby identifies as unknown persons, and makes such unknown persons defendants herein to the end that title to said property may be vested in the United States of America to the extent hereinafter prayed for.

V.

That the defendants Doe One to Doe Five Hundred, inclusive, and defendants One Doe Corporation, a corporation, to Twenty-five Doe Corporation, a corporation, inclusive, are and each is sued or named herein under

the fictitious names above set out for the reason that plaintiff is ignorant of the true names of said defendants; that when the true names of said defendants, or any of them, are discovered, plaintiff will amend accordingly the pleadings or proceedings herein.

That One Doe Corporation to Twenty-five Doe Corporation, inclusive, is each a corporation, organized and existing under the laws of one of the states of the United States.

VI.

That this action is brought by the plaintiff under the authority of and pursuant to the provisions of the Act of Congress approved February 26, 1931 (46 Stat. 1421, 40 U. S. C. A., Sec. 258a), and acts supplementary thereto and amendatory thereof, and under the further authority of the Act of Congress approved August 25, 1941 (Public Law 247—77th Congress), the Act of Congress approved March 5, 1942 (Public Law 474—77th Congress), the Merchant Marine Act of 1936, as amended, and the Act of Congress approved March 27, 1942 (Public Law 507—77th Congress), and any acts amendatory thereof or supplementary thereto; that the public use for which the lands hereinafter described are sought to be taken is the same as authorized by said acts, and is for the construction of facilities to be used in the construction and repair of ships and the operation of such facilities. [186]

VII.

That since the filing of plaintiff's original complaint herein, the United States Maritime Commission, acting by and through E. S. Land, Chairman of the United States Maritime Commission, hereinbefore referred to as the "requesting officer," has caused to be filed herein and has filed on behalf of the plaintiff its Declaration of Taking No. 1 and Amended Declaration of Taking, pursuant to the provisions of the Act of Congress approved February 26, 1931 (46 Stat. 1421, 40 U. S. C. A., Sec. 258a), wherein and whereby the property hereinafter described is taken for the use and benefit of the United States of America; that simultaneously with the filing of the said Declaration of Taking No. 1 and the said Amended Declaration of Taking, plaintiff paid and deposited in the Registry of this court, to the use of the persons entitled thereto, a sum of money as the estimated just compensation for the taking of the real property specifically described in the said Declaration of Taking No. 1 and the said Amended Declaration of Taking.

VIII.

That the property hereinafter described, which is sought to be taken and condemned herein, was shown upon a plat or plan annexed to the said Declaration of Taking No. 1 and to the said Amended Declaration of Taking, which said plats or plans are specifically referred to and identified in the said Declaration of Taking No. 1 and Amended Declaration of Taking as Exhibit "B" attached thereto, and specific reference is hereby made to said plats or plans.

IX.

That the lands to be taken and condemned in this action are described as follows: [187]

Those Certain Parcels of Land in the City of National City, County of San Diego, State of California, More Particularly Described as Follows:

Parcel 1. [Description not printed as it is same as set forth in Complaint on page 6.]

Parcel 2. [Description not printed as it is same as set forth in Complaint on page 7.]

Parcel 3. [Description not printed as it is same as set forth in Complaint on page 7.] [188]

Parcel 4. [Description not printed as it is same as set forth in Complaint on page 8.] [189]

Parcel 5. [Description not printed as it is same as set forth in Complaint on page 9.]

Parcel 6. [Description not printed as it is same as set forth in Complaint on page 10.] [190]

Parcel 7. [Description not printed as it is same as set forth in Complaint on page 10.]

Parcel 8. [Description not printed as it is same as set forth in Complaint on page 11.] [191]

Parcel 9. [Description not printed as it is same as set forth in Complaint on page 11.]

Parcel 10. [Description not printed as it is same as set forth in Complaint on page 12.] [192]

Parcel 11. [Description not printed as it is same as set forth in Complaint on page 13.] [193]

PARCEL A

That portion of the tidelands lying between the U. S. Bulkhead Line and Pierhead Line of San Diego Bay, National City, County of San Diego, California, described as follows:

[Description not printed as it is same as set forth in Amendment to Complaint on page 24.] [194]

X.

That the estate or interest in the real property hereinbefore described which plaintiff by this action intends and seeks to take, acquire, condemn, hold and own is the fee simple title thereto, excepting, however, all the right, title and interest of the United States of America or its agent, Defense Plant Corporation, in and to said real estate, including all improvements and fixtures located thereon or in any way appertaining thereto, which have heretofore vested in the United States or its agent, Defense Plant Corporation, by virtue of the following instruments: Agreement dated December 27, 1941, between the Defense Plant Corporation and the Tavares Construction Company, Inc.; Agreement dated November 27, 1941, between the United States Maritime Commission and the Tavares Construction Company, Inc.; Lease Agreement dated January 1, 1942, between the City of National City and the Tavares Construction Company, Inc., and assignment thereof to the Defense Plant Corporation, dated January 30, 1942; Agreement dated October 26, 1943, between the United States Maritime Commission and the

Tavares Construction Company, Inc.; Agreement dated June 30, 1942, between the United States Maritime Commission and the Tavares Construction Company, Inc.; Agreement dated November 30, 1943, between the United States Maritime Commission and the Tavares Construction Company, Inc., a copy of each of which said contracts is attached to the said Amended Declaration of Taking on file in the office of the Clerk of the above entitled court in the records of the within action as Exhibit 1 to Exhibit 6, inclusive, and to which reference is hereby made.

XI.

That the defendant City of National City, a municipal corporation is the apparent and presumptive owner of the real property hereinbefore described and referred to as Parcels 1, 2, 3, 5, 6, 7, 8 and A; that the defendant The Atchison, Topeka & Santa Fe Railway Company, a corporation, is the apparent and presumptive owner of the real property hereinbefore described as Parcel 4; that the defendants Carl A. Johnson and Pearl Johnson are the apparent and presumptive owners of the real property hereinbefore described as Parcel 9; that the defendant Santa Fe Land Improvement Company, a corporation, is the apparent and [195] presumptive owner of the real property hereinbefore described as Parcels 10 and 11; that the defendants Tavares Construction Company, Inc., a corporation, San Francisco Bridge Company, a corporation, Leonard McLauchlin, both individually and doing business under the name and style of McLauchlin Water

Taxi Company, San Diego and Arizona Eastern Railway Company, a corporation, City of National City, a municipal corporation, County of San Diego, a body politic and corporate, State of California, a corporation sovereign, Doe One to Doe Five Hundred, inclusive, One Doe Corporation, a corporation, to Twenty-five Doe Corporation, a corporation inclusive, each claims some right, title, interest, or lien to, in, or upon the said real property or some part thereof, the exact nature of which such claim or claims is unknown to plaintiff.

XII.

That the defendant City of National City is a municipal corporation organized and existing under and by virtue of the laws of the State of California; that the defendant County of San Diego is a body politic and corporate organized and existing under and by virtue of the laws of the State of California; that the defendant State of California is a corporation sovereign and one of the states composing the United States of America;

That the defendants Tavares Construction Company, Inc., San Francisco Bridge Company, and Santa Fe Land Improvement Company are, and each of said defendants is, a corporation organized and existing under and by virtue of the laws of the State of California;

That the defendant The Atchison, Topeka & Santa Fe Railway Company is a corporation organized and existing under and by virtue of the laws of the State of Kansas;

That the defendant San Diego and Arizona Eastern Railway Company is a corporation organized and existing under and by virtue of the laws of the State of Nevada;

That the defendant Leonard McLauchlin is an individual doing business under the fictitious firm name and style of McLauchlin Water Taxi Company. [196]

Wherefore, plaintiff prays judgment:

1. That the Court ascertain and assess the value of the lands herein sought to be taken and condemned, and each and every separate estate or interest therein;

2. Adjudging that the public use for which plaintiff takes and condemns said lands is a necessary public use of the plaintiff and that the use to which said lands are being applied is a use authorized by law and that all of said lands are necessary thereto;

3. Vesting in the United States of America the fee simple title to the lands hereinbefore described, to be utilized for construction of facilities by the United States for the construction and repair of ships and the operation of such facilities for war purposes, and for such other uses as may be authorized by Congress or by Executive Order, and that the said lands shall be deemed to be condemned and taken for the use of the United States of America for the uses and purposes hereinbefore set forth; and

Further adjudging that the right to just compensation for the taking of said lands hereinbefore described be vested in the persons entitled thereto as their respective interests may appear and be established and adjudged herein;

4. That all liens or encumbrances of record against the property herein sought to be taken and condemned be satisfied out of the award to be made in this proceeding;

5. That an order be made for the delivery of immediate possession of said lands to the United States of America pursuant to the provisions of the Acts of Congress hereinbefore set forth, and that an order be made for the notice to be given of such order for possession;

6. For such other and further relief as the Court deems meet and proper in the premises and as the nature of the case may require.

Dated: This 30th day of December, 1944.

EUGENE D. WILLIAMS

Special Assistant to the Attorney General

WM. J. ADAMS

Special Attorney, Lands Division
Department of Justice

By Wm. J. Adams

Attorneys for Plaintiff

[Endorsed]: Filed Jan. 15, 1945. Edmund L. Smith,
Clerk. [197]

[Title of District Court and Cause]

MOTION FOR MORE DEFINITE STATEMENT
OR FOR BILL OF PARTICULARS

Come now the defendants Tavares Construction Company, Inc., a corporation, Concrete Ship Constructors, a joint venture, Stroud-Seabrook, a copartnership, Lloyd S. Stroud, R. S. Seabrook, C. M. Elliott, Carlos Tavares, Henry M. Page and Don F. Gates, and move the Court for an order requiring the plaintiff to set forth a more definite statement in its Amended and Supplemental Complaint or for a bill of particulars, on the ground that said Amended and Supplemental Complaint is ambiguous, uncertain, and capable of varied interpretations as to what rights and interests of these defendants are sought to be condemned and that it is necessary for these matters to be averred with sufficient definiteness or particularity [198] to enable these defendants properly to prepare their responsive pleading and to prepare for trial.

The defects complained of are as follows:

(a) Paragraph IX of the Amended and Supplemental Complaint describes twelve parcels of land sought to be condemned, of which Parcels 1, 2, 9, 10 and 11 are alleged to be under lease from the various owners thereof to defendant, Tavares Construction Company, Inc.

(b) Paragraph X of the Amended and Supplemental Complaint alleges that plaintiff seeks to condemn the fee simple title to said real property, excepting all the right, title and interest of the United States of America or its agent, Defense Plant Corporation, in and to said real estate, including all improvements and fixtures located thereon or in any way appertaining thereto, which have

heretofore vested in the United States or its agent, Defense Plant Corporation, by virtue of certain agreements referred to therein to which these defendants are parties. By these agreements the United States was to acquire title to the lands and convey it to Defense Plant Corporation. By these agreements Tavares Construction Company, Inc. constructed shipyard facilities on these lands and acquired machinery for Defense Plant Corporation, which facilities and machinery remained personalty even though affixed or attached to the realty. By these agreements the use of the land, facilities and equipment was leased to these defendants for the construction of ships for the Maritime Commission, and these defendants were granted an option to purchase the lands, facilities and machinery on the termination of the lease.

(c) These defendants can not ascertain from said Amended and Supplemental Complaint whether the plaintiff seeks to condemn only the leasehold interests of [199] Tavares Construction Company, Inc. in Parcels 1, 2, 9, 10 and 11, which Tavares Construction Company, Inc. obtained from the owners of said parcels, or whether the plaintiff also seeks to condemn the leasehold and option rights acquired by these defendants under the agreements referred to in Paragraph X, and if so, to what extent.

The details desired are as follows:

1. To more definitely state whether it is sought to condemn only the leasehold rights of Tavares Construction Company in the lands described as Parcels 1, 2, 9, 10 and 11, as set forth in Paragraph IX of the Amended and Supplemental Complaint and derived from the defendant owners of such lands, or whether it is also sought to condemn the leasehold and option rights granted these

defendants by Defense Plant Corporation and United States Maritime Commission by the various agreements referred to in Paragraph X of said Complaint to use and purchase all of the parcels of land described in said Paragraph IX.

2. To more definitely state whether or not it is sought to condemn the leasehold and option rights granted these defendants by Defense Plant Corporation and United States Maritime Commission pursuant to the various agreements referred to in Paragraph X of said Complaint to use and purchase the shipyard facilities constructed by these defendants on said lands, and/or the machinery placed on said lands by these defendants, which facilities and machinery by the terms of said agreements remain personalty even though some of them are affixed or attached to the realty, and if so, to state with particularity the items of such facilities and machinery sought to be condemned. [200]

3. To more definitely state whether the purpose of the Amended and Supplemental Complaint is to condemn the lands described in Paragraph IX in order to enable the Defense Plant Corporation and United States Maritime Commission to fully perform and carry out their agreements with these defendants referred to in Paragraph X of said Complaint, or is in contravention thereof and for the purpose of depriving these defendants of all of their rights to use and purchase said lands, facilities and machinery as granted in said agreements.

Said motion will be based upon the files and records in the above entitled action as specifically referred to in Paragraph X of said Complaint, and upon the Points and Authorities attached hereto.

Dated this 2nd day of March, 1945.

JOHN M. MARTIN
FRANK L. MARTIN, JR.
CHARLES C. CROUCH
GEORGE W. CROUCH

Attorneys for Defendants Tavares Construction Company, Inc., a corporation, Concrete Ship Constructors, a joint venture, Stroud-Seabrook, a copartnership, Lloyd S. Stroud, R. S. Seabrook, C. M. Elliott, Carlos Tavares, Henry M. Page and Don F. Gates [201]

AUTHORITIES

"Before responding to a pleading * * * a party may move for a more definite statement or for a bill of particulars of any matter which is not averred with sufficient definiteness or particularity to enable him properly to prepare his responsive pleading or to prepare for trial. The motion shall point out the defects complained of and the details desired. * * *" Rule 12(e) of Federal Rules of Civil Procedure.

A complaint which seemed capable of varied interpretations was subject to motion for more definite statement or for bill of particulars. *Herman v. Mutual Life Ins. Co.*, 108 F. (2d) 678.

POINTS

The Agreement dated December 27, 1941 between Defense Plant Corporation and Tavares Construction Company, Inc. referred to in Paragraph X of the Amended and Supplemental Complaint and amendments thereto, provides for the acquisition of the site by Defense Plant Corporation, the construction of shipyard facilities and installation of machinery by Tavares Construction Com-

pany, Inc. thereon, title to which was to vest in Defense Plant Corporation, and the right of Tavares Construction Company, Inc. to use said site, facilities and machinery for the construction of ships for the United States Maritime Commission. Paragraph Fifteen of said Agreement grants to Tavares Construction Company, Inc. the opinion to purchase the site, facilities and machinery from Defense Plant Corporation. Said Agreement was amended on November 11, 1942, after the filing of the above entitled action, which amendment contains, among others, the following provisions: [202]

“Whereas, the Government is proceeding to acquire title to additional land to be used as a part of the site for the facilities * * *, and

Whereas, upon acquisition of title to such additional land by the Government the Maritime Commission has indicated that it will cause the same to be conveyed to Defense Corporation upon receipt of payment of the cost thereof;

Now Therefore in consideration of the premises it is agreed by and between the parties hereto that said Agreement of Lease entered into on December 27, 1941, by and between Defense Corporation and Lessee, as amended, be and the same hereby is further amended in the following particulars:

* * * * *

By adding thereto the following new paragraph
Thirty-one:

Thirty-one: Lessee agrees that when Defense Corporation shall have acquired title to that part of the site now being condemned by the Government, the Agreement of Lease, dated December 27, 1941, as

amended, shall be further amended so as to provide for an increase in the maximum amount of expenditures to be made by Defense Corporation in the amount of the cost thereof to Defense Corporation (which amount shall not exceed the cost thereof to the Government), and an increase in the amount of rental to be paid by Lessee under said Agreement of Lease, as amended, in an amount sufficient to cover the cost of such part of the site. Lessee further agrees that in the event the property leased to Lessee under said Agreement of Lease, as amended, should be transferred to another branch of the Government pursuant to Paragraph Twenty-six thereof prior to the acquisition by Defense Corporation [203] of title to that part of the site now being condemned by the Government, Lessee will, if it should thereafter elect to exercise the option to purchase conferred by Paragraph Fifteen of said Agreement of Lease, as amended, pay to the Government the cost to it of such part of the site on the same basis as if such cost had been part of the cost to Defense Corporation of the property leased to Lessee under said Agreement of Lease, as amended."

In order for defendants to properly prepare their Answer and prepare for trial, it is necessary for them to be informed as to exactly what rights and interests of these defendants the plaintiff is seeking to acquire by virtue of this action. [204]

Received copy of the within Motion this 5 day of March, 1945. C. H. Scharnikow.

[Endorsed]: Filed Mar. 5, 1945. Edmund L. Smith, Clerk. [205]

[Minutes: Monday, March 26, 1945]

Present: The Honorable Harry A. Hollzer, District Judge.

This cause coming on for hearing motion of defendants Tavares Construction Co., Inc., et al., for more definite statement or Bill of Particulars, pursuant to stipulation filed March 5, 1945; C. H. Scharnikow, Special Assistant to the Attorney General, appearing as counsel for the Government; John M. Martin, Esq., and Frank L. Martin, Jr., Esq., appearing as counsel for the defendants:

Attorney Fred Martin, Jr., argues in support of the said motion.

Attorney Scharnikow makes a statement and answers certain questions of the Court. Attorney John M. Martin makes a statement.

The Court states that for clarity of the record it is ordered that the plaintiff shall, within three weeks, file a more definite statement or Bill of Particulars, such as will conform to the statements epitomized by Attorney Scharnikow and that defendant Tavares Construction Co., Inc., shall have three weeks thereafter to plead to the Amended Bill of Complaint.

Notice is waived in open court by both sides. [206]

[Title of District Court and Cause]

BILL OF PARTICULARS

Comes now the plaintiff, United States of America, by and through Eugene D. Williams, Special Assistant to the Attorney General, and Wm. J. Adams, Special Attorney, Lands Division, Department of Justice, and pursuant to the Order of this Court dated March 26, 1945, granting the Motion of the defendants Tavares Construction Company, Inc., et al., for a More Definite Statement or a Bill of Particulars, files the following Bill of Particulars with reference to the allegations contained in Paragraph X of plaintiff's Amended and Supplemental Complaint, to-wit:

That with respect to the defendants Tavares Construction Company, Inc., a corporation, Concrete Ship Constructors, a joint venture, Stroud-Seabrook, a co-partnership, Lloyd S. Stroud, R. S. Seabrook, C. M. Elliott, Carlos Tavares, Henry M. Page, and Don F. Gates, the right, title, interest, and estate in and to the lands and all improvements and facilities located thereon described in plaintiff's Amended and Supplemental Complaint which by this action plaintiff intends and seeks to take, acquire, condemn, hold, and [207] own, is the fee simple title, including the right, title, interest, or estate, if any, in or to said lands, and all improvements and fixtures located thereon, or in any way appertaining thereto, owned, held, or claimed by said defendants, or either of them, and excepting therefrom only such right, title, interest, or

estate in said lands and all improvements and fixtures located thereon, or in any way appertaining thereto, which was vested in the United States of America or its agent, Defense Plant Corporation, at the date of the filing of this action or immediately prior to the filing of the respective Declarations of Taking under the agreements referred to in Paragraph X of the Amended and Supplemental Complaint.

Dated: April 12, 1945.

EUGENE D. WILLIAMS

Special Assistant to the Attorney General

WM. J. ADAMS

Special Attorney, Lands Division

Department of Justice

By Eugene D. Williams

Attorneys for Plaintiff

Receipt of a copy of the foregoing Bill of Particulars is hereby acknowledged this 13 day of April, 1945. John M. Martin, Frank L. Martin, Jr., Charles C. Crouch, George W. Crouch, by John M. Martin, Attorneys for Defendants Tavares Construction Company, Inc., etc., et al.

[Endorsed]: Filed Apr. 16, 1945. Edmund L. Smith, Clerk. [208]

[Title of District Court and Cause]

ANSWER TO AMENDED AND SUPPLEMENTAL
COMPLAINT IN CONDEMNATION, AND
COUNTER-CLAIM AND CROSS-CLAIM OF
DEFENDANTS TAVARES CONSTRUCTION
COMPANY, INC., A CORPORATION, CON-
CRETE SHIP CONSTRUCTORS, A JOINT
VENTURE, STROUD-SEABROOK, A COPART-
NERSHIP, LLOYD S. STROUD, R. S. SEA-
BROOK, C. M. ELLIOTT, CARLOS TAVARES,
HENRY M. PAGE, AND DON F. GATES

Come now the defendants, Tavares Construction Com-
pany, Inc., a corporation, Concrete Ship Constructors, a
joint venture, Stroud-Seabrook, a copartnership, Lloyd
S. Stroud, R. S. Seabrook, C. M. Elliott, Carlos Tavares,
Henry M. Page, and Don F. Gates, and for their Answer
to plaintiff's Amended and Supplemental Complaint and
plaintiff's Bill of Particulars, and for their Counter-
Claim against the plaintiff, United States of America,
and for their Cross-Claim against defendants, City of
National City, a municipal corporation, State of Cali-
fornia, a corporation sovereign, the County of San Diego,
a body politic and corporate, Atchison, Topeka & Santa
Fe Railway, a corporation, San Francisco Bridge Com-
pany, a corporation, Leonard McLaughlin, McLaughlin
Water Taxi Company, Carl A. Johnson, [209] Pearl
Johnson, Santa Fe Land Improvement Company, a cor-
poration, San Diego & Arizona Eastern Railway Com-
pany, a corporation, and Defense Plant Corporation, an
agency of the United States of America, and admit, deny
and allege:

I.

Answering Paragraph VII of the Amended and Supplemental Complaint, these answering defendants deny that plaintiff has paid or deposited in the Registry of this Court any sum of money to the use of these defendants, or any of them, as the estimated just compensation for the acquisition of any property or rights of these answering defendants herein sought to be condemned.

II.

Answering Paragraph VIII of said Amended and Supplemental Complaint, these answering defendants deny that there is shown upon said plat or plan annexed to said Declaration of Taking No. 1 and said Amended Declaration of Taking the improvements and fixtures located thereon which plaintiff in its Bill of Particulars alleges it is seeking to take, acquire and condemn.

III.

Answering Paragraphs X and XI of said Amended and Supplemental Complaint as supplemented by said Bill of Particulars, these answering defendants admit and allege that they claim and have a right, title and interest in and to said real property and in and to the improvements, fixtures and personal property located thereon in which title vested in the United States or Defense Plant Corporation by virtue of the Agreements referred to in said Paragraph X, as follows:

(a) By the terms of said Agreement dated December 27, 1941 between defendant Tavares Construction Company, Inc., and defendant Defense Plant Corporation referred to in Paragraph X of said Complaint and attached to said Amended Declaration of Taking, and various amendments of said Agreement, Defense Plant Corpora-

tion [210] agreed to acquire and hold in conformity with the terms of said Agreement and amendments thereto the real property described in said Complaint, and said Tavares Construction Company, Inc. agreed to and has pursuant thereto constructed for said Defense Plant Corporation certain shipyard facilities and acquired certain machinery for the construction of ships on said real property, without profit to Tavares Construction Company, Inc., title to which facilities and machinery vested in Defense Plant Corporation. In consideration thereof Defense Plant Corporation by the terms of said Agreement and amendments thereto, leased to Tavares Construction Company, Inc. said real property, facilities, and machinery for a term ending December 31, 1947, and agreed to extend said term to December 31, 1949. Said lease further provides that when the rent paid by Tavares Construction Company, Inc. thereunder to Defense Plant Corporation equals the amount expended by Defense Plant Corporation for said facilities and machinery plus 4% interest, that Tavares Construction Company, Inc. shall not be required to pay any further rentals. Said rental payments have now been paid in full and Tavares Construction Company, Inc. is now entitled to use and occupy said premises, facilities and machinery rent free for the remainder of said term and extension thereof. Said lease gives the right to Defense Plant Corporation to terminate said lease upon certain conditions, but in the event of such termination Tavares Construction Company, Inc. is granted the right and option to purchase said site, facilities and machinery from Defense Plant Corporation. Said lease is now in full force and effect and these answering defendants are occupying and using said site, facilities and machinery pursuant thereto.

(b) By the terms of Amendment dated November 11, 1942 to said Agreement dated December 27, 1941 between Tavares Construction Company, Inc. and Defense Plant Corporation, it was understood that Defense Plant Corporation would acquire the fee [211] simple title to the site, being the real property described in the aforesaid Amended and Supplemental Complaint, through this condemnation action by the Government. That these answering defendants are informed and believe and upon such information and belief allege that the purpose of this action is for plaintiff to acquire the fee simple title to said site, and transfer it to Defense Plant Corporation, in order to carry out said Agreement and Amendments thereto between Tavares Construction Company, Inc. and Defense Plant Corporation. That when so acquired, Tavares Construction Company, Inc. will have the right under said lease to occupy and use said site, rent free ,for the remainder of the term and extension thereof, and in the event of termination of said lease, will have the right and option at its election, to either purchase said site, as well as all of the improvements, facilities and machinery located thereon belonging to Defense Plant Corporation, or to lease the whole or a portion thereof.

(c) These answering defendants have been granted the further right to use and occupy said site, facilities and machinery rent free, from time to time by plaintiff, acting through the United States Maritime Commission, the Navy Department, and the War Department, under various contracts for the construction of ships and the repair of ships and that defendant Concrete Ship Constructors, a joint venture, in which Tavares Construction Company, Inc. is a member, is now so occupying and using the same for such purposes.

(d) These answering defendants are informed and believe and upon such information and belief allege that the correct interpretation of the Amended and Supplemental Complaint as amended by the Bill of Particulars shows that the object and purpose of this action is to enable Defense Plant Corporation to carry out the terms and provisions of its said Agreement of December 27, 1941 as amended, through the acquisition by plaintiff of the real property herein sought to be condemned, without in any manner divesting these [212] answering defendants of or otherwise affecting their leasehold and option rights granted to them by Defense Plant Corporation. If the court should determine that the correct interpretation of the Amended and Supplemental Complaint as amended by the Bill of Particulars shows that it is sought herein to condemn and acquire from these answering defendants any of their lease, option or other rights under said Agreement with Defense Plant Corporation, these answering defendants allege that said rights are of very substantial value, that the court should determine and decree the exact extent and nature thereof that plaintiff by this action seeks to acquire and thereby relieve Defense Plant Corporation from its contract obligations, determine and decree the value of such rights as these answering defendants may by this action be deprived, and award these answering defendants just compensation therefor.

IV.

That defendant City of National City herein has attempted to oust the jurisdiction of this Court and nullify this Court's Order of Possession by the commencement of an independent action against these answering defendants in the Superior Court of the State of California in

and for the County of San Diego, being an action entitled "City of National City, a municipal corporation, Plaintiff, vs. Tavares Construction Company, Inc., a corporation, et al., Defendants," No. 121165, and filed August 25, 1944. That in said Superior Court action the defendant City of National City seeks to recover the sum of \$76,346.29 from these answering defendants for the use of said premises during the period commencing at the time plaintiff took possession of said premises pursuant to the Order of Possession issued by this Court in the above entitled cause on November 10, 1942, to the date of the filing of said Superior Court action, and for further amounts which it alleges will accrue after the commencement of said action, and has caused a Writ of Attachment to be issued and levied on moneys belonging to these answering defendants [213]

V.

That in order to avoid a multiplicity of actions and to enable this Court to properly administer its Order of Possession and to do equity herein, this Court should fully determine in this action the respective rights of all parties thereto. These answering defendants allege that the plaintiff took possession of the premises described in the Amended and Supplemental Complaint under and by virtue of the authority granted by the Second War Powers Act approved March 27, 1942 (Public Law 507, 77th Congress) and that the Order of Possession dated November 10, 1942, and the Order of Possession dated September 23, 1944, confirmed and conferred the legal right of possession of each and all of the premises described in the Amended and Supplemental Complaint upon the plaintiff, and that the plaintiff, acting through the defendant, Defense Plant Corporation, had by the afore-

said written lease dated December 27, 1941, and the amendments thereto granted the Tavares Construction Company, Inc. exclusive possession of said premises.

VI.

That by the terms of the written contracts for the construction of ships and repair of ships entered into subsequent to November 10, 1942 between United States Maritime Commission, the Navy Department and the War Department, acting for and on behalf of the plaintiff, and these answering defendants, the plaintiff has represented that it owned said premises and agreed that the use and occupancy of all of said premises by these answering defendants would be without rental or other charge.

VII.

That the sole right of the defendant City of National City and each and all of the other cross-defendants to recover compensation for the use of the premises described in the Amended and Supplemental Complaint during the period subsequent to November 10, 1942, being the date of entry of this Court's Order of Possession as to [214] Parcels Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11, and the date of the actual taking of Parcel A, is to seek an award herein against the plaintiff for compensation for the use of said premises during said period of advance possession. These answering defendants seek a decree herein as against all of the parties herein so adjudicating the rights of these defendants.

Wherefore, these answering defendants pray judgment—

1. That the Court decree that the lease dated December 27, 1941, as amended, between Defense Plant Corpo-

ration and Tavares Construction Company, Inc., is a valid lease, is in full force and effect, and will continue to be in full force and effect in accordance with the terms and provisions thereof, and that the title taken by the plaintiff herein is subject to said lease and amendments thereto.

2. That plaintiff be required to set forth the items of property and state what rights, if any, plaintiff now seeks to take from these answering defendants by virtue of this action; that the Court determine the value thereof and award to these defendants just compensation therefor.

3. That the Court determine to what extent, if at all, plaintiff seeks by this action to deprive these answering defendants of their right to have Defense Plant Corporation carry out and live up to the terms and provisions of the lease and option rights heretofore granted by Defense Plant Corporation to these answering defendants, and the extent, if at all, to which these answering defendants are thereby damaged by Defense Plant Corporation being relieved from proceeding to carry out said lease and option in favor of these answering defendants, and award these answering defendants just compensation therefor.

4. That there is no rent or other compensation due from any of these answering defendants to either the plaintiff or to any of the cross-defendants on account of the use and occupancy [215] of any of the premises described in the Amended and Supplemental Complaint subsequent to November 10, 1942.

5. That the cross-defendants and each of them be required to assert their claims, if any they have, to the premises described in the Amended and Supplemental Complaint, and to rents or compensation for the use and occupancy thereof subsequent to November 10, 1942, in this action, and that the Court decree that the sole obligation to compensate said cross-defendants therefor is that of the plaintiff.

6. For costs of suit, and for such other and further relief as the Court may deem just and proper.

JOHN M. MARTIN

FRANK L. MARTIN, JR.

CHARLES C. CROUCH

GEORGE W. CROUCH

Attorneys for Defendants, Tavares Construction Company, Inc., a corporation, Concrete Ship Constructors, a joint venture, Stroud-Seabrook, a copartnership, Lloyd S. Stroud, R. S. Seabrook, C. M. Elliott, Carlos Tavares, Henry M. Page, and Don F. Gates [216]

[Verified.] [217]

[Affidavits of Service by Mail.] [218-219]

[Endorsed]: Filed May 4, 1945. Edmund L. Smith, Clerk.

[Title of District Court and Cause]

ORDER

For good cause shown, and upon joint motion of counsel for the plaintiff and the defendants, Tavares Construction Company, Inc., a corporation, Concrete Ship Constructors, a joint venture, Stroud-Seabrook, a copartnership, Lloyd S. Stroud, R. S. Seabrook, C. M. Elliott, Carlos Tavares, Henry M. Page, and Don F. Gates, the submission of this case as to said defendants as upon pre-trial shall be made and argued before the Honorable Leon Yankwich at Los Angeles on the 30th day of September, 1946.

In all other respects, and for all other purposes, said cause as to all defendants shall remain, for further proceedings in the regular course, upon the San Diego calendar and in the Southern Division.

Dated: This 24th day of September, 1946.

LEON R. YANKWICH

United States District Judge

[Endorsed]: Filed Sep. 25, 1946. Edmund L. Smith,
Clerk. [220]

[Title of District Court and Cause]

STIPULATION AND AGREED STATEMENT OF
FACTS IN SUPPORT OF JOINT MOTION OF
COUNSEL FOR PLAINTIFF AND THE
DEFENDANTS, TAVARES CONSTRUCTION
COMPANY, INC. ET AL RELATIVE TO SUB-
MISSION OF THIS CASE AS TO SAID DE-
FENDANTS AS UPON PRE-TRIAL.

It Is Hereby Stipulated and Agreed by and between counsel for the plaintiff and the defendants, Tavares Construction Company, Inc., a corporation, Concrete Ship Constructors, a joint venture, Stroud-Seabrook, a copartnership, Lloyd S. Stroud, R. S. Seabrook, C. M. Elliott, Carlos Tavares, Henry M. Page, and Don F. Gates, as follows:

1. The defendant, Tavares Construction Company, Inc. was one of the joint adventurers who entered into contracts with the Maritime Commission to construct concrete barges, and the interest of the Tavares Construction Company, Inc. arose as hereinafter set forth.

2. The Tavares Construction Company hereinafter referred to as TCC held a lease of certain water-front property at National City, Calif. This lease was assigned to Tavares by the Allied Engineering and Shipbuilding Company. Thereafter, and about February 2, 1942, Tavares and National City entered into a new lease, subsequently assigned to Defense Plant Corporation. [221]

3. On or about the 27th day of December, 1941, an "Agreement Of Lease" was entered into by Defense Plant Corporation, hereinafter referred to as DPC, and Tavares Construction Company, Inc., a corporation, one of the defendants herein, a true copy of which "Agreement of Lease" and the other Agreements amendatory thereof are attached to the Amended Declaration of Taking filed herein under date of December 23, 1944.

4. On November 10, 1942, the Government commenced this action and on the same day obtained an Order for Possession under the Second War Powers Act. One day after the commencement of said condemnation the Government, through its agent DPC, granted the lease and option rights to the defendant, Tavares Construction Company, as set forth in the Amended Lease Agreement of November 11, 1942, heretofore referred to at number 3 of this Statement of Facts.

5. On September 23, 1944, the Government filed an Amendment to its Complaint in Condemnation and on the same day obtained an order for immediate possession in conformity therewith.

6. On October 3, 1944, the Government filed its original Declaration of Taking.

7. On December 20, 1944, the Government filed its Supplemental and Amended Complaint in Condemnation.

8. On December 23, 1944, the Government filed its Amended Declaration of Taking, and decree was duly entered thereon on December 27, 1944.

9. On March 26, 1945, the Court heard and granted defendants' Motion for a Bill of Particulars, at which time counsel for plaintiff submitted for consideration of the Court copy of a letter written by Paul D. Page, Jr., Solicitor for the Maritime Commission, to the United States Attorney General, dated March 19, 1945, which letter was as follows: [222]

"The Honorable
The Attorney General

Ref: 33-5-924-1

Sir:

Reference is made to your letter of March 19, 1945, in connection with United States v. Certain parcels of land in the City of National City, San Diego County, California, Tavares Construction Co., et al, Civil 248-SD.

In reply to your letter, you are advised that it was and is the intention of the Maritime Commission to acquire in this proceeding full title to the land and all improvements thereon, and thereby to acquire any and all rights in and to said land and improvements other than the rights of the United States or its agent, Defense Plant Corporation.

Respectfully,

Paul D. Page, Jr.
Solicitor"

10. Pursuant to the hearing aforesaid, the Court ordered the plaintiff to file a Bill of Particulars, and on March 13, 1945, the Government filed its Bill of Particulars, which at line 29, page 1 thereof states:

“the right, title, interest, and estate in and to the lands and all improvements and facilities located thereon described in plaintiff’s Amended and Supplemental Complaint, which by this action plaintiff intends and seeks to take, acquire, condemn, hold, and own, is the fee simple title, including the right, title, interest, or estate, if any, in or to said lands, and all improvements and fixtures located thereon, or in any way appertaining thereto, owned, held, or claimed by said defendants, or either of them, and excepting therefrom only such right, title, interest, or estate in said [223] lands and all improvements and fixtures located thereon, or in any way appertaining thereto, which was vested in the United States of America or its agent, Defense Plant Corporation, at the date of the filing of this action or immediately prior to the filing of the respective Declaration of Taking under the agreements referred to in Paragraph X of the Amended and Supplemental Complaint.”

11. On May 3, 1945, the defendants, Tavares Construction Company, Inc., et al, filed their Answer and Counter-Claim to plaintiff’s Amended and Supplemental Complaint.

12. Subsequent to the entry of the decree on the Amended Declaration of Taking, the Eleventh Naval District by letter dated November 16, 1945, notified the Concrete Ship Construction (being the joint venture of

which Tavares Construction Company, Inc. was a member) as follows:

“COMMANDANT’S OFFICE
ELEVENTH NAVAL DISTRICT
San Diego 30, Calif.

16 Nov. 1945

Concrete Ship Constructors

P. O. Box D, Foot of 13th Street,

National City, California.

Gentlemen:

As you are aware the Navy Department has authorized the award of certain contracts for the construction of piers to serve the U. S. Naval Repair Base, San Diego. This work will involve the use and possession of certain portions of land now owned by the United States of America and under the jurisdiction of the Maritime Commission as well as lands on which you claim to have a lease.

The Government-owned lands have been declared surplus by the Maritime Commission and it is understood that [224] formal transfer of jurisdiction over the property will be made to the Navy Department within a few days. Insofar as you have any interest in the lands on which your facilities are located the possession of which is necessary to carry out the above referred to contracts, will you please indicate in writing that you have no objection to the Government’s use and occupation of the area necessary?

The Navy Department has also requested that it be informed whether the contemplated construction under the above referred to contracts will interfere with the repair of naval vessels by your company operating under any contracts which you may have with the Bureau of Ships. Will you please furnish information with respect to this matter?

Very truly yours,

R. FOWLER

Executive Assistant .

Public Works Officer

Eleventh Naval District"

13. Under date of November 21, 1945, the defendant, Concrete Ship Constructors, notified the *Eleven* Naval District by letter, as follows:

"November 21, 1945.

"Commandant
Eleventh Naval District
San Diego 30, California

Navy Ref: ND11/NB12/L9-3(a)
(PW)

Dear Sir:

This will acknowledge receipt of your letter dated 16 Nov. 1945 and with reference thereto, please be advised that we have expressed verbally several times that we are willing and ready to assist in the expediting of the Navy's construction program where and whenever possible. [225]

With reference to Paragraph Four of your letter regarding contemplated improvements interfering with repair of Navy vessels, we wish to advise that we are not familiar with the construction details or how another contractor would carry on construction operations. However, we believe the work can be carried on so as to leave a portion of the docks available for ship repair at all times.

This company is under certain obligations to the Defense Plant Corporation and the United States Maritime Commission for the maintenance of and protection of certain facilities located at this yard. We expect the Navy to assume such responsibility insofar as Navy improvements are concerned. We request that the Office in Charge of Contemplated Construction confer with us from time to time to the end that interference with construction activities be cut to a minimum.

You are familiar with the various costs and expenses in connection with the operation of a yard of this magnitude, such as taxes, insurance, plant protection, roads and maintenance and we believe it fair that such costs be prorated in accordance with the yard's use by any others.

Yours truly,

CONCRETE SHIP CONSTRUCTORS

By R. S. Seabrook

Managing Partner"

14. On December 28, 1945, the 11th Naval District notified the defendant, Concrete Ship Constructors, by letter, as follows:

“COMMANDANT’S OFFICE
ELEVENTH NAVAL DISTRICT
San Diego, 30, California.

ND11/NB12/NI-13 (u)
28 December 1945 [226]
Concrete Ship Constructors,
P. O. Box D,
National City, California.

Gentlemen:

In reply to the Commandant’s letter of 16 November 1945 you advised by letter of 21 November 1945 that you had no objections to the use of your yard by the Navy Department and its contractors provided that the Navy Department will agree to bear a pro rata share of the expenses in connection with the operation of the yard which you are obliged to pay by virtue of your lease and facilities contract from the Defense Plant Corporation dated 27 December 1941.

It is the understanding of this office that in the condemnation proceeding entitled “U. S. v. certain parcels of land in the City of National City, California”, Civil 248-SD, your real estate interests in the premises may have been acquired by the Govern-

ment. Until this is clarified, the Navy Department would not be justified in making an unqualified agreement to share expenses which may not be owing by you. Therefore, the only agreement that can be made would be that the Navy Department will bear a share of the expenses if it is later determined that these expenses were necessarily incurred by virtue of your agreement with the Defense Plant Corporation. Will you please advise whether you would be willing to enter into such an agreement as a condition to allowing the use of the yard on which your facilities are erected to carry out present contracts for the construction of facilities to berth ships of the Reserve Fleet?

The Commandant has recommended that the above referred to proceeding be amended to acquire all of your real estate interests in the premises. It is necessary [227] however to know the exact nature of the claims you will make in the proceeding if this course is taken. Will you please therefore advise the items for which you will claim compensation in the proceeding and the amounts thereof?

Very truly yours,

A. K. FOGG

Public Works Officer
11th Naval District"

15. On December 4, 1945, the 11th Naval District notified defendant, Concrete Ship Constructors, by letter, as follows:

“COMMANDANT’S OFFICE
ELEVENTH NAVAL DISTRICT
San Diego 30, California.

ND11/NB12/L9-3(a)

(PW)

4 Dec 1945

Concrete Ship Constructors

Post Office Box D

National City, California

Gentlemen:

Reference is made to your letter of November 21, 1945 regarding proposed construction involving procurement of lands presently used by Concrete Ship Constructors. It appears that some settlement can probably be worked out to the satisfaction of all parties concerned. Your expression of willingness to cooperate and assist in expediting the Navy’s construction program is appreciated.

Very truly yours,

A. K. FOGG

Public Works Officer

11th Naval District”

16. On January 10, 1946, the defendant, Tavares Construction Company, Inc., notified Reconstruction Finance Corporation, by [228] letter as follows:

“January 10, 1946

Reconstruction Finance Corporation
Successors to Defense Plant Corporation
523 West Sixth Street
Los Angeles 14, California

Subject: Security Plancor 407

Gentlemen:

In furtherance of our discussion of December 3rd, at your Los Angeles office, at which time we informed you that the Department of Public Works, 11th Naval District, had let contracts for the alterations and additions to shipyard at National City, we wish to set forth additional information.

These contracts provided, among other things, for the use and occupancy by the Navy Contractors of certain areas within the shipyard site for construction purposes; the demolition of the pier, a portion of the warehouse building and other building; the dredging of the mole to the bulkhead line; the reconstruction of the quay wall throughout the entire length of the property; and other alterations. We wish you to know that we are no longer able to protect this property, for it has been opened for use to others whose numbers will be far in excess of the numbers employed by this company.

Yours truly,

TAVARES CONSTRUCTION CO. Inc.

By R. S. Seabrook”

17. On March 20, 1946, Defense Plant Corporation delivered to defendant a copy of telegram, as follows:

To: Mr. Duncan, Defense Plant Corporation, San Diego, California.

From: Engineering Division, Defense Plant Corporation, Los Angeles, California. [229]

RE PLANCOR 407 TAVARES CONSTRUCTION COMPANY ALL FACILITIES WERE CONVEYED TO THE NAVY DEPARTMENT BY AGREEMENT OF TRANSFER AND INDEMNITY ENTERED INTO BY THE NAVY DEPARTMENT, MARITIME COMMISSION AND THIS CORPORATION UNDER DATE OF MARCH 1, 1946. SAID AGREEMENT PROVIDED THAT EFFECTIVE AS OF MIDNIGHT OF JANUARY 1, 1946, THAT TRANSFER OF THE FACILITIES TO THE NAVY DEPARTMENT BECOMES EFFECTIVE. ANY RIGHTS UNDER THE AGREEMENT OF LEASE WITH TAVARES CONSTRUCTION COMPANY WHICH MIGHT HAVE BEEN EXERCISED BY THIS CORPORATION WERE VESTED IN THE NAVY DEPARTMENT EFFECTIVE AS OF JANUARY 1, 1946. THE NAVY DEPARTMENT HAS INSTRUCTED ITS REPRESENTATIVES TO COOPERATE WITH YOUR STAFF ON THE INVENTORY BEING TAKEN IN CONNECTION WITH THE PLANCOR.

ENGINEERING DIVISION
DEFENSE PLANT CORPORATION."

18. On April 16, 1946, defendant was delivered copy of telegram from the Navy Department to counsel for plaintiff, as follows:

“SAN DIEGO CALIF APR 16 1946 719P

JOE MCPHERSON

SPECIAL ASST. TO ATTORNEY GENERAL

THIS BUREAU WILL NOT AUTHORIZE PAYMENT OF ANY TAXES ON PROPERTY OCCUPIED BY TAVARES CONSTRUCTION COMPANY CIVIL 248 SD. AMENDED DECLARATION OF TAKING FILED DECEMBER TWENTY THREE NINETEEN HUNDRED FORTY FOUR INCLUDED A DEPOSIT OF FIFTY FIVE THOUSAND ONE HUNDRED AND TEN DOLLARS FOR PARCEL ONE. UNDER AGREEMENT OF TRANSFER AND INDEMNITY RFC AND MARITIME COMMISSION TRANSFERRED ALL RIGHT TITLE AND INTEREST TO PROPERTY INCLUDED IN PLANCOR FOUR HUNDRED SEVEN TO THE NAV EFFECTIVE ONE JANUARY NINETEEN FORTY SIX. COPY OF AGREEMENT BEING FORWARDED TO COMMANDANT ELEVENTH NAVAL DISTRICT

BUREAU OF YARDS AND DOCKS NAVY
DEPT WASH DC.” [230]

19. On August 5, 1946, defendant notified Eleventh Naval District by letter as follows:

"August 5, 1946

A. K. Fogg, Captain (CEC), U.S.N.
Officer-in-Charge of Construction Contracts,
Eleventh Naval District,
Naval Operating Base,
San Diego, California.

Dear Sir:

Reference is made to your recent verbal request to Concrete Ship Constructors (of which Tavares Construction Company, Inc. is a member) to submit a bid to the Navy for the performance of the work of filling in Drydocks No. 1 and No. 2 on the property located in National City, now under lease to Tavares Construction Company, Inc. pursuant to that certain lease dated December 27, 1941, and amendments thereto, between Defense Plant Corporation, as lessor, and Tavares Construction Company, as lessee, known as Plancor 407.

We regret to advise that Concrete Ship Constructors is unwilling to submit such a bid, as the filling in of these drydocks is contrary to the best interests of Concrete Ship Constructors and Tavares Construction Company, Inc.

For your information, Tavares Construction Company, Inc. holds an option to purchase all of the site, facilities and machinery which it installed upon the leased premises pursuant to the terms of said Plancor 407. The two drydocks on which you request Concrete Ship Constructors to submit a bid for the

work of filling in are a part of these facilities. We most virorously protest the destruction of these two drydocks.

We object to the destruction, alteration or other damaging of any part or portion of the site, facilities [231] and machinery that is the subject of our option to purchase under Plancor 407.

Very truly yours,

TAVARES CONSTRUCTION
COMPANY, INC.”

20. On August 8, 1946, Reconstruction Finance Corporation advised defendant by letter as follows:

“RECONSTRUCTION FINANCE
CORPORATION

Office of Defense Plants
523 West Sixth St.
Los Angeles, 14, Calif.
Michigan 6321

August 8, 1946

Tavares Construction Company,
National City,
California

Attention: Gregory D. Smith, Administrative
Manager

Re: Plancor 407

Dear Sirs:

By an agreement of transfer and indemnity dated March 1, 1946, all rights, title and interest of this Corporation under the lease agreement dated December 27, 1941, as amended, with your company

was transferred to the U. S. Navy Department effective as of midnight January 1, 1946.

To complete our files, we shall appreciate receiving your statement in duplicate that all insurance premiums and taxes applicable to the property under lease from the inception of the lease agreement, December 27, 1941, through January 1, 1946, have been or will be paid.

We shall appreciate, also, your statement as to use of the facilities for repair of ships for parties other than the Government subsequent to January 31, 1945, accompanied by remittance covering rental due, if any, as confirmed by letter addressed to you February 14, 1945, by H. P. Jenkins, Assistant Chief, Leased Plants Division, [232] Washington.

Very truly yours,

Anthony Drozda, Supervisor
Plant Servicing Section"

21. On September 5, 1946, the Secretary of the Navy notified the defendant by letter dated September 3, 1946, as follows:

"Tavares Construction Company, Inc.
National City, California

Sirs:

Reference is made to that certain "Agreement of Lease," designated as D.P.C. Plancor No. 407 made and entered into on December 27, 1941, by and between the Defense Plant Corporation and Tavares Construction Company, Inc., and the various amendments thereto.

In accordance with the terms of paragraph 26 of Plancor 407 the United States Maritime Commission, the Reconstruction Finance Corporation as successor to the Defense plant Corporation, and the Navy Department entered into an Agreement of Transfer and Indemnity on March 1, 1946, wherein the Navy Department succeeded to all the rights, powers, privileges, discretions and obligations of the Defense Plant Corporation and the U. S. Maritime Commission under Plancor 407. The effective date of the Agreement of Transfer and Indemnity was January 1, 1946.

In accordance with the provisions of paragraph 12 of Plancor 407, which provides that at any time when substantial use by the lessee of the site, facilities and machinery shall be no longer required to enable lessee to construct boats for the Government, the Defense Plant Corporation may, with the written approval of the Maritime Commission, give written notice to the lessor that such substantial use is no longer required and that the Defense Plant Corporation therefore proposes the [233] termination of the lease, or extension thereof, notice is hereby given to you that the Navy Department elects to terminate Plancor 407 and any extensions thereof.

A permit will be issued to you to allow for the completion of any ship repair contracts currently in effect between you and the Bureau of Ships of the Navy Department.

Very truly yours,

WILLIS R. DUDLEY

By direction of the Chief of the Bureau
of Yards and Docks, acting under the
direction of the Secretary of the Navy"

22. On September 12, 1946, the 11th Naval District notified the defendant by letter, as follows:

"COMMANDANT'S OFFICE
ELEVENTH NAVAL DISTRICT
San Diego 30, Calif.

ND11/NB12/NI-13(3)

12 September 1946

Tavares Construction Company, Inc.,
National City,
California

Gentlemen:

It is noted from Bureau of Yards and Docks' letter of 3 September 1946 that the Navy Department has elected to terminate Plancor No. 407 with your company. It is accordingly, requested that you remove the materials and equipment belonging to your company except such as may be necessary for your current contracts with the Navy. It is believed that a terminal date of November 1 will be sufficient for you to accomplish this. In the event that this date is inadequate, it is requested that you suggest one. The purpose in setting such a date is to permit the Navy to move in on the site and clean up and dispose of any materials or equipment that may be considered to have been abandoned by your company. [234]

Very truly yours,

A. K. FOGG

Public Works Officer
11th Naval District"

23. On September 13, 1946, the defendant made written demand upon plaintiff by letter, as follows:

"September 13, 1946

To Chief of the Bureau of Yards and Docks,
Navy Department,
Washington, D. C.

To United States Maritime Commission,
Commerce Building,
Washington, D. C.

To Reconstruction Finance Corporation
as successor to Defense Plant Corporation
Office of Defense Plants,
523 West Sixth Street,
Los Angeles, 14, California.

Attention: Mr. Willis R. Dudley,
Bureau of Yards and Docks

Subject: Termination of D.P.G.
Plancor 407

Reference: ND11/NI-13
T5-13-SD(MC)
F-5-3/WWB:mr

Sirs:

We are in receipt of your notice dated 3 September 1946 that the Navy Department, as successor to all of the rights and obligations of Defense Plant Corporation and the United States Maritime Commission, elects to terminate DPC Plancor 407 and any extensions thereof.

This notice was received on 5 September 1946. We understand that this is the ten day notice of

termination provided for in Paragraph Twelve of Plancor 407, being the Agreement of Lease dated December 27, 1941 and amendments thereto, between Defense Plant Corporation, as Lessor, and Tavares Construction Company, Inc., as Lessee.

We direct your attention to Paragraph Fifteen of Plancor 407 as amended by Paragraph Thirty-one added by amendatory #5, dated November 11, 1942, which grants [235] to Tavares Construction Company, Inc., upon termination of the lease under Paragraph Twelve, the right and option for a period of ninety days after such termination, to purchase the site, facilities and machinery. Tavares Construction Company, Inc., believes that it is entitled to know for the full ninety day option period the exact amount of the option price.

Demand is hereby made upon you and each of you that Tavares Construction Company, Inc., be immediately advised of the following:

1. The exact amount of the purchase price and the details of the calculation thereof under subparagraph (a) of paragraph Fifteen of Plancor 407 and amendments.
2. The exact amount of the purchase price and the details of the calculation thereof under subparagraph (b) of paragraph Fifteen of Plancor 407 and amendments.

We wish to call attention to the fact that a substantial portion of the facilities have been and are being destroyed by the Navy Department without our consent. Please advise as to what credit the

Government proposes to allow on the purchase price by reason of such destruction.

We wish to further call attention to the fact that the Navy Department has constructed substantial improvements on the site without our consent. We request specific information as to whether the Government proposes to add the cost thereof to our option price.

In order for us to intelligently elect as to the exercise of our option it is necessary that we know the exact option price. Also we feel that we are entitled to have the full ninety-day period after the receipt of [236] this information within which to elect.

Kindly let us have your prompt reply.

Very truly yours,

TAVARES CONSTRUCTION
COMPANY, INC.

Carlos Tavares

Carlos Tavares, President."

24. Except for this action and the Declaration of Taking herein filed and the Orders and Decrees heretofore entered in this action, and the Secretary of the Navy's letter dated September 3, 1946 above set forth at Paragraph 21 hereof, the defendant Tavares Construction Company, Inc., at all times herein mentioned has been and now is entitled to the possession and right to purchase all of the site, facilities and machinery in accordance with the terms and provisions of Paragraph Fifteen of the Agreement of Lease of December 27, 1941, as amended.

25. Subsequent to the entry of the decree on the Declaration of Taking above referred to, the Government, acting through its Navy Department, has taken physical possession of a major portion of the site and the facilities above referred to, and has proceeded not only to deprive said defendants of possession thereof, but have removed and destroyed approximately one-third more or less of the improvements and facilities erected upon the site by the defendants under the terms of the aforesaid Lease Agreement.

26. Tavares Construction Company, Inc. has heretofore furnished or constructed all of the improvements, facilities and machinery on said site for DPC as required by the terms of its lease, at a total cost to DPC of approximately \$2,700,000.

27. Tavares Construction Company, Inc. has paid as rental to DPC for the use of said site, facilities and machinery, in accordance with the terms of said lease, a total sum in excess of \$2,700,000.

28. Tavares Construction Company, Inc. has paid, for the benefit of DPC and in conformity with the terms of its lease, all taxes, [237] insurance premiums and maintenance charges on said site, facilities and machinery.

29. All of the aforesaid improvements, facilities and machinery were so furnished or constructed by Tavares Construction Company, Inc. without any compensation or fee for its supervisory services in connection therewith other than the compensation represented by the granting by DPC to said defendant, Tavares Construction Company, Inc., of the option to purchase all but not part of said site, facilities and machinery as set forth at Paragraph Fifteen of the Lease Agreement.

30. The Navy has awarded contracts for additions to said shipyard site, which as of September 21, 1946, total approximately \$4,573,650, upon which contracts the defendant estimates expenditures to September 21, 1946, to be approximately \$3,176,790.

31. The physical destruction by the Navy of the improvements and facilities as aforesaid, has substantially diminished the value of the property and option rights of the defendant.

32. The foregoing Stipulation of Facts are as presently understood. If any or either of them are found to be untrue, inaccurate or incomplete, the truth with respect thereto or as to any other material fact may be asserted

~~entered~~ and proven notwithstanding this Stipulation.

Dated: September 26, 1946.

UNITED STATES OF AMERICA

By Joseph F. McPherson

Special Assistant to the Attorney General

Attorney for Plaintiff

JOHN M. MARTIN

FRANK L. MARTIN, JR.

CHARLES C. CROUCH, and

GEORGE W. CROUCH

By John M. Martin

Attorneys for Defendants, Tavares Construction
Company, Inc., et al.

[Endorsed]: Filed Sep. 27, 1946. Edmund L. Smith,
Clerk. [238]

[Title of District Court and Cause]

JOINT MEMORANDUM OF COUNSEL ON
PRETRIAL

On December 27, 1941, Tavares Construction Company (one of the joint adventurers in Concrete Ship Constructors), being then the assignee of a lease on what is known in the suit as Parcel 1, assigned its lease thereon to and subleased said parcel from Defense Plant Corporation, undertaking to construct and erect thereon, for the account of the Defense Plant Corporation, the facilities necessary for use in the construction of certain ships then being built by the Concrete Ship Constructors under contract with the Maritime Commission.

The "Agreement of Lease." dated December 27, 1941, which together with its amendments and supplements established the relationship as to the site and facilities, contemplated the absorption of the cost of the facilities by approximately equal amortization thereof over the ships being constructed thereon for the Maritime Commission, the covenants of the "Agreement of Lease" retaining the personal aspects of [239] the facilities as between Defense Plant Corporation and Tavares Construction Company and providing for the construction and installation of such facilities without profit to the contractor.

The "Agreement of Lease" also contains express provisions for its cancellation for cause, in the event of completion of the shipbuilding contracts, claimed priority of other departments than the Maritime Commission or

the Defense Plant Corporation, and for other causes and reasons not here material. Paragraph 15 of the instrument provides:

“Fifteen: Upon the expiration or termination of this lease or extension thereof pursuant to paragraph Twelve hereof, or upon cancellation of this lease or extension thereof pursuant to clause (a) of paragraph Fourteen hereof (unless such cancellation shall have been effected because of a violation by Lessee of the contracts referred to in said clause (a)), Lessee shall have and is hereby granted, for a period of ninety (90) days after such termination, expiration, or cancellation (hereinafter referred to as the “Option Period”) the right and option, by written notice to Defense Plant Corporation and to the Maritime Commission, to purchase all but not part of the Site, Facilities and Machinery at the following prices:” (The method of determining the amount of the option price, being immaterial, is omitted.)

The clause further provides:

“Defense Corporation further agrees, to the extent that it lawfully may, that it will not sell the Facilities and Machinery, or any part thereof, to any party or parties other than another branch of the Government (in which event such sale shall be in all respects subject to paragraph Twenty-six hereof) for a period of ninety (90) days following the expiration of the full Option Period unless it shall first have

offered the same for sale to Lessee at a price equal to the best offer received by Defense Corporation and Lessee shall [240] have failed or refused to purchase the same within thirty (30) days after the receipt of such offer."

Thereafter, and from time to time, the construction of additional ships contracted for by the Maritime Commission required enlargement of the site and the construction of additional facilities. These were provided for by simple amendments altering the amount Defense Plant Corporation should be required to expend for such installations and adjusting the amount of amortization applicable to each ship built by the use thereof. Amendment No. 5, dated November 11, 1942 (one day after the filing of the condemnation proceeding), recites that the Government is proceeding to acquire additional land to be used as a part of the "site for the facilities", and further:

"Whereas, upon acquisition of title to such additional land by the Government the Maritime Commission has indicated that it will cause the same to be conveyed to Defense Corporation upon receipt of payment of the cost thereof.

"Lessee further agrees that in the event the property leased to Lessee under said Agreement of Lease, as amended, should be transferred to another branch of the Government pursuant to paragraph Twenty-six thereof prior to the acquisition by Defense Corporation of title to that part of the Site now being condemned by the Government, Lessee will, if it should thereafter elect to exercise the option to purchase conferred by paragraph Fifteen of said Agreement

of Lease, as amended, pay to the Government the cost to it of such part of the Site on the same basis as if such cost had been part of the cost to Defense Corporation of the property leased to Lessee under said Agreement of Lease, as amended."

On December 20, 1944, the Amended and Supplemental Complaint in Condemnation was filed. A dispute arose as to the scope of the taking, and on March 26, 1945, Tavares Construction Company moved this court for a Bill of Particulars (see paragraph C, pages 2 and 3 of Motion to [241] Make More Definite, to the effect that Tavares could not determine from the Amended and Supplemental Complaint whether the plaintiff was also condemning its leasehold and option rights and, if so, to what extent).

On March 26, 1945, motion for Bill of Particulars was heard before the late Judge Hollzer, at which hearing there was read into the record the letter from Paul Page, copied at length on page 3 of the Stipulation of Facts filed herein on September 26, 1946. The motion for Bill of Particulars was granted.

On April 13, 1945, a Bill of Particulars was filed, which, though improperly dated, is copied in full in paragraph numbered 10 on page 3 of the Stipulation of Facts filed herein on September 26, 1946.

At or near the completion by Concrete Ship Constructors of its shipbuilding contracts with the Maritime Commission, with the knowledge and consent of Defense Plant Corporation and the Maritime Commission, Tavares Construction Company commenced ship repair and alteration work on the site in question for its own private account,

and also undertook to and did repair at such site a number of naval vessels of the United States.

On numerous occasions during the use of the site for ship repair purposes as above indicated, agreements were made from time to time between the Navy Department and Tavares Construction Company, resulting in restricted use of the site facilities and improvements by the Tavares Construction Company and providing for joint use thereof with the Navy Department. All such restrictions, however, as were made by the Navy Department upon the use of such facilities and improvements, or providing for the joint use thereof, have been pursuant to and by virtue of the separate agreements between that department and the Tavares Construction Company, except that the Tavares Construction Company has not agreed to and does not consent to the destruction or removal of any of the facilities and improvements, and asserts that its agreements to such restricted use and such joint use were in each instance made in reliance upon its interpretation of the Bill of Particulars and in light of Federal Rule of Civil Procedure No. 12-E. [242]

The issues to be determined by the court as upon pre-trial are:

(a) Have the lease and option rights of Tavares Construction Company, granted under the "Agreement of Lease" dated December 27, 1941, and by the supplements thereto, been taken and condemned by this action?

(b) Does the defendant, Tavares Construction Company, have a compensable interest in the property taken by the condemnation proceeding?

The foregoing Joint Memorandum of Counsel is based upon the Stipulation of Facts heretofore filed and their understanding of such additional facts as are recited herein. If any or either of them are found to be untrue, inaccurate or incomplete, the truth with respect thereto or as to any other material fact may be asserted and proven notwithstanding this joint memorandum.

Dated: October 4, 1946.

UNITED STATES OF AMERICA
JAMES M. CARTER

United States Attorney

By Joseph F. McPherson

Special Assistant to the Attorney General

Attorneys for Plaintiff

JOHN M. MARTIN

FRANK L. MARTIN, JR.

CHARLES C. CROUCH, and

GEORGE W. CROUCH

By John M. Martin

Attorneys for Defendants, Tavares Construction
Company, Inc., et al.

[Endorsed]: Filed Oct. 4, 1946. Edmund L. Smith,
Clerk. [243]

[Title of District Court and Cause]

Honorable Leon R. Yankwich, Judge

RULING ON PRE-TRIAL HEARING AS TO THE
INTEREST OF TAVARES CONSTRUCTION
COMPANY, INC.

The Court having considered upon pre-trial the matters heretofore submitted on September 30, 1946, calling for the determination of the nature of the interest of Tavares Construction Company, Inc., involved in this proceeding, does now, after consideration of the record and the joint stipulation filed on September 27, 1946, and the additional memorandum filed on October 4, 1946, and the argument of counsel, determine the said matters as follows:

The Court answers the two questions propounded to it which sum up the findings desired in the following manner:

“(a) Have the lease and option rights of Tavares Construction Company, granted under the ‘Agreement of Lease’ dated December 27, 1941, and by the supplements thereto, been taken and condemned by this action?” [244]

The Court answers affirmatively.

“(b) Does the defendant, Tavares Construction Company, have a compensable interest in the property taken by the condemnation proceeding?”

The Court answers affirmatively.

The Court orders specific findings entered in accordance with such answers.

Because of the urgency in the matter and because of my absence from the Central Division, I hereby indicate briefly to counsel the grounds of decision as a guide in the preparation of the formal order.

I am satisfied that the pleadings on file, including the Bill of Particulars, which must be considered as an amendment to the Government's amended Complaint, the contemporaneous and the present understanding of the original lessor and its successors, as well as of those connected with the "taking" agency, disclose an intention to condemn all the interests of Tavares Construction Company acquired under the "Agreement of Lease" dated December 27, 1941. It is inconceivable that men high in Governmental station, including high executive officers of the Navy, would take the position that they can command the Construction Company at will and destroy facilities upon its subleased premises, unless thoroughly convinced, by the record, that it is the intention of this condemnation proceeding to terminate whatever interest the Construction Company had. There are numerous statements, referred to in the stipulation, which show that the various Governmental agencies were expressing not only their own interpretation of what was being done, but that of highly trained legal executives. And this interpretation is borne out by the facts referred to and is sound in law. (*United States v. Sunset Cemetery Co.*, 1943, [245] 7 Cir., 132 F. (2) 163.)

This conclusion makes it unnecessary to determine, as an abstract proposition, whether an option to buy is compensable. For here we have not a "naked" option to buy, but an interest in a sublease, coupled with option rights. And the interest in the sublease, with or without option rights, is compensable. The existence of the option is a matter to be considered by experts in determining the value of the property taken. And that is a question of fact to be determined at the trial. (See, *United States v. Sunset Cemetery Co.*, *supra*; *Brooklyn Eastern Dist. Terminal v. City of New York*, 1944, 2 Cir., 139 F. (2) 1006; *Westchester County Park Commission v. United States*, 1944, 2 Cir., 143 F. (2) 688. These decisions are in the spirit of the guide posts laid down in *Brooks-Scanlon Corporation v. United States*, 1924, 265 U. S. 106.)

Counsel will prepare a formal pre-trial order embodying these conclusions and so much of the facts as they desire to incorporate in it from the Agreed Statement and the Memorandum, either by reference or directly.

Dated this 10th day of October, 1946.

LEON R. YANKWICH

Judge

[Endorsed]: Filed Oct. 10, 1946. Edmund L. Smith,
Clerk. [246]

[Title of District Court and Cause]

ORDER UPON PRETRIAL

The Court, having considered upon pretrial the matters heretofore submitted on September 30, 1946, calling for the determination of the nature of the interest of Tavares Construction Company, Inc., involved in this proceeding, does now, after consideration of the record and the joint stipulation filed on September 27, 1946, and the additional memorandum filed on October 4, 1946 and the argument of counsel, determine:

(1) That the lease and option rights of Tavares Construction Company, Inc., granted under the "Agreement of Lease," dated December 27, 1941, and by the supplements thereto, have been taken and condemned by this action.

(2) That the defendant Tavares Construction Company, Inc., has a compensable interest in the property taken by this proceeding.

(3) That the facts are as set forth in the joint stipulation and joint memorandum of counsel above referred to and the Court's written opinion filed herein on October 10, 1946.

Dated: This 5th day of February, 1947.

LEON R. YANKWICH

United States District Judge

[Endorsed]: Filed Feb. 5, 1947. Edmund L. Smith,
Clerk. [247]

In the District Court of the United States in and for the
Southern District of California
Southern Division

No. 248-SD Civil

UNITED STATES OF AMERICA,

Plaintiff,

v.

CERTAIN PARCELS OF LAND IN THE CITY OF
NATIONAL CITY, COUNTY OF SAN DIEGO,
STATE OF CALIFORNIA; TAVARES CON-
STRUCTION COMPANY, et al.,

Defendants.

JUDGMENT UPON THE VERDICT

The within action came on regularly for trial before the above-entitled court, the Honorable Paul J. McCormick, Judge presiding, sitting with a jury, on February 17, 1947, for determination and adjudication of the just compensation to be paid for the condemnation and taking of the real property hereinafter described and referred to as Parcels 1, 2, 3, 5, 6, 7, 8, 9 and A, and for the condemnation and taking of the interests of Tavares Construction Company, Inc., a corporation, Concrete Ship Constructors, a joint venture, Lloyd S. Stroud, R. S. Seabrook, Stroud-Seabrook, a copartnership, C. M. Elliott, Carlos Tavares, Henry M. Page and Don F. Gates, in and to the real property described in plaintiff's Amended and Supplemental Complaint in Condemnation and hereinafter described, and all improvements, facilities and fixtures located thereon, and the option, leasehold and possessory rights of said defendants arising out of

or by virtue of that certain lease and agreement dated December 27, 1941, between Defense Plant Corporation and Tavares Construction Company, Inc., as amended (commonly known as Plancor 407, as [249] amended); said trial being had upon plaintiff's Amended and Supplemental Complaint in Condemnation and the Answer of defendants Carl A. Johnson and Pearl Johnson, the Second Amended Answer of defendant City of National City, the Answer, Counter-claim and Cross-claim of defendants Tavares Construction Company, Inc., Concrete Ship Constructors, a joint venture, Lloyd S. Stroud, R. S. Seabrook, Stroud-Seabrook, a copartnership, C. M. Elliott, Carlos Tavares, Henry M. Page and Don F. Gates, the Answer of defendant San Francisco Bridge Company, a corporation, the Answer of defendant Leonard McLaughlan, the Answer of defendant State of California, and the Answer of defendant County of San Diego; and

Plaintiff appearing by and through its attorneys of record, C. U. Landrum, Special Assistant to the Attorney General, and Robert G. Berrey, Special Attorney, and defendants Carl A. Johnson and Pearl Johnson appearing by and through their attorney, Hunter M. Muir, defendant City of National City appearing by and through its attorneys, Monroe & McInnis, Jean Daze Ratello, and Campbell & Campbell, defendants Tavares Construction Company, Inc., Concrete Ship Constructors, Lloyd S. Stroud, R. S. Seabrook, Stroud-Seabrook, C. M. Elliott, Carlos Tavares, Henry M. Page and Don F. Gates, appearing by and through their attorneys, John M. Martin, Frank L. Martin, Jr., and Charles C. Crouch, defendant San Francisco Bridge Company appearing by and through its attorney, G. H. Sloane, defendant Leonard McLaughlan appearing in propria persona, defendant State of

California appearing by and through its attorneys L. G. Campbell and John F. Hasslen, Jr., Deputies Attorney General, and defendant County of San Diego appearing by and through its attorney, Duane J. Carnes, Deputy District Attorney; and

Thereupon, evidence both oral and documentary having been introduced by and on behalf of plaintiff and said defendants upon the issues before the court and jury, including the issue of the just compensation and the fair market value of Parcels 1, 2, 3, 5, 6, 7, 8, 9 and A, and the right, title and interest of defendants Tavares Construction Company, Inc., Concrete Ship Constructors, Lloyd S. Stroud, R. S. Seabrook, [250] Stroud-Seabrook, C. M. Elliott, Carlos Tavares, Henry M. Page and Don F. Gates, in and to Parcels 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and A herein, and all improvements, facilities and fixtures located thereon, and the option, leasehold and possessory rights granted said last named defendants, or any of them, by the aforesaid lease and agreement dated December 27, 1941, as amended, and the jury having heard and deliberated upon the evidence and having reported to the court its Verdict; and

Defendants City of National City and Leonard McLauchlan having stipulated that the sum of Forty Dollars (\$40.00) is the just compensation for the interest of said defendant Leonard McLauchlan in and to said Parcel 8, and that said sum be paid to defendant Leonard McLauchlan out of the award to defendant City of National City in full payment of all his right, title and interest in and to said parcel 8; and defendants Carl A. Johnson and Pearl Johnson and defendant County of San Diego having stipulated that Forty-Five Dollars and Ninety-Nine Cents (\$45.99) is the amount of defendant County of

San Diego's lien for taxes against Parcel 9; and defendant State of California having stipulated with defendant City of National City to accept the sum of One Dollar (\$1.00) in full satisfaction of its rights, title, and interest in and to said Parcels 1, 2, 3, 5, 6, 7, 8 and A; and the court, being fully advised in the premises, finds:

I.

That as to the said Parcels 1, 2, 3, 5, 6, 7, 8, 9 and A and any and all right, title and interest of defendants Tavares Construction Company, Inc., Concrete Ship Constructors, Lloyd S. Stroud, R. S. Seabrook, Stroud-Seabrook, C. M. Elliott, Carlos Tavares, Henry M. Page and Don F. Gates, in and to Parcels 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and A, hereinafter described, and all improvements, facilities and fixtures thereon, and the option, leasehold and possessory rights granted said last named defendants, or any of them, by that certain lease and agreement dated December 27, 1941, between Defense Plant Corporation and Tavares Construction Company, Inc., a corporation, as amended (commonly known as [251] Plancor 407, as amended), the allegations contained in Paragraphs I, II, III, VI, VII, VIII, IX, X and XII of plaintiff's Amended and Supplemental Complaint in Condemnation are, and each of said allegations is, true.

II.

That in the Declaration of Taking No. 1 filed herein on October 3, 1944, there was included the real property designated as Parcels 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and A, which is hereinafter more particularly described, and that contemporaneously with the filing of said Declaration Taking No. 1 plaintiff deposited in the Registry of this

Court a sum of money as the estimated just compensation for the condemnation and taking of said parcels, which sum of money included the sum of One Hundred Six Thousand Two Hundred and Forty Dollars (\$106,240.00) as the estimated just compensation for the taking of Parcels 2, 3, 5, 6, 7, 8 and A, and the sum of Twenty-One Hundred Dollars (\$2100.00) as the estimated just compensation for the taking of said Parcel 9.

III.

That on October 3, 1944, by Decree on Declaration of Taking No. 1, pursuant to the provisions of Title 40, Sec. 248a, et seq., of United States Code, entered on said date by the Honorable Paul J. McCormick, one of the judges of the above-entitled court, the lands set forth and described in said Declaration of Taking No. 1, and the whole thereof, including the said Parcels 2, 3, 5, 6, 7, 8, 9, 10, 11 and A, hereinafter more particularly described, and the fee simple title thereto, as modified by the language of said Declaration of Taking No. 1, was declared to be and was condemned and taken for the use of the United States of America.

IV.

That on December 23, 1944, there was filed herein an Amended Declaration of Taking, which included the real property designated as Parcels 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and A, which are hereinafter more particularly described; that the estimated just compensation for the taking of said Parcels 1, 2, 3, 5, 6, 7, 8 and A, as shown by said [252] Amended Declaration of Taking, is the sum of One Hundred Sixty-One Thousand Three Hundred and Fifty Dollars (\$161,350.00), and the estimated just compensation for the taking of Parcel 9, as shown by

said Amended Declaration of Taking, is the sum of Twenty-One Hundred Dollars (\$2100.00); and that contemporaneously with the filing of said Amended Declaration of Taking plaintiff deposited in the Registry of this Court as the estimated just compensation for the taking of Parcel 1 the sum of Fifty-Five Thousand One Hundred and Ten Dollars (\$55,110.00).

V.

That on December 27, 1941, by Decree on Amended Declaration of Taking, pursuant to the provisions of Title 40, Sec. 258a, et seq., of United States Code, entered on said date by the Honorable Paul J. McCormick, one of the judges of the above-entitled court, the lands set forth and described in said Amended Declaration of Taking, and the whole thereof, including Parcels 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and A, hereinafter more particularly described, and the fee simple title thereto, excepting, however, all of the right, title and interest of the United States of America, or its agent, Defense Plant Corporation, in and to said real estate, including all improvements, facilities and fixtures located thereon, or in any way appertaining thereto which had theretofore vested in the United States of America, or its agent, Defense Plant Corporation, by virtue of the instruments enumerated in and attached to said Amended Declaration of Taking, was declared to be condemned and taken for the use of the United States of America.

VI.

That on the eighth day of April 1947 there was filed herein Amendment No. 1 to the Amended Declaration of Taking and simultaneously therewith the amount of \$150,473.00 was deposited as additional estimated com-

pensation, which amount when added to the amount deposited with the Declaration of Taking and the Amended Declaration of Taking increased the estimated compensation of Parcels 1, 2, 3, 5, 6, 7, 8, and A to \$310,475.00 and for Parcel 9 to \$3,448.00; and that on the eighth day of [253] April 1947 the Court entered its decree on said Amendment No. 1 to the Amended Declaration of Taking confirming the deposit of said money.

VII.

That plaintiff, by its Declaration of Taking No. 1, filed herein on October 3, 1944, its Amended Declaration of Taking filed herein on December 23, 1944, its Amended and Supplemental Complaint in Condemnation herein, and its Bill of Particulars filed herein on April 16, 1945, which Bill of Particulars is considered as an amendment to plaintiff's Amended and Supplemental Complaint in Condemnation, has taken and condemned all of the interests of defendants Tavares Construction Company, Inc., Concrete Ship Constructors, Lloyd S. Stroud, R. S. Seabrook, Stroud-Seabrook, C. M. Elliott, Carlos Tavares, Henry M. Page and Don F. Gates, in and to the real property designated as Parcels 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and A, and hereinafter described, and all improvements, facilities and fixtures located thereon, and the option, leasehold and possessory rights granted to said last named defendants, or any of them, by that certain lease and agreement dated December 27, 1941, between Defense Plant Corporation, and Tavares Construction Company, Inc., as amended (commonly known as Plancor 407, as amended).

VIII.

That at the time of the taking by plaintiff of the real property described and designated herein, and in said Declaration of Taking No. 1, Amended Declaration of Taking and Amended and Supplemental Complaint in Condemnation, as Parcel 9, and prior to being divested of title thereto, defendants Carl A. Johnson and Pearl Johnson, husband and wife, were the owners of said real property, and that no other person or persons have or then had any right, title, interest or estate in or to said Parcel 9, or any portion thereof, except defendant County of San Diego; that the interest of said defendant County of San Diego was a lien for County taxes. [254]

IX.

That at the time of the taking by plaintiff of the real property described and designated herein, and in said Declaration of Taking No. 1, Amended Declaration of Taking, and Amended and Supplemental Complaint in Condemnation, as Parcels 1, 2, 3, 5, 6, 7, 8 and A, and prior to being divested of title thereto, defendant City of National City was the owner of said real property, and that no other person or persons have or then had any right, title, interest, or estate in or to said real property, or any portion thereof, except the defendant San Francisco Bridge Company, a corporation, defendant Leonard McLauchlan, defendant State of California, and plaintiff, United States of America; that the interest of said San Francisco Bridge Company in and to said real property consisted of a lease from defendant City of National City covering the real property designated as Parcel 7 and a portion of the real property designated as Parcel A; that the interest of defendant Leonard McLauchlan in and to said real property consisted of a lease from de-

fendant City of National City covering Parcel 8; that the interest of defendant State of California was a reversionary interest; that the interest of plaintiff, United States of America, was that of assignee of certain leases from defendant City of National City, lessor, to defendant Tavares Construction Company, Inc., lessee.

X.

That prior to December 23, 1944, defendant Tavares Construction Company, Inc., was the lessee of the real property designated as Parcels 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and A and described in plaintiff's Declaration of Taking No. 1, Amended Declaration of Taking and Amended and Supplemental Complaint in Condemnation, and hereinafter described, together with all improvements, facilities and fixtures located thereon, under that certain lease and agreement dated December 27, 1941, between Defense Plant Corporation, an agency of plaintiff, and Tavares Construction Company, Inc., as amended (commonly known as Plancor 407, as amended), which lease and agreement also granted to defendant Tavares [255] Construction Company, Inc. certain option rights to purchase said real property, together with said improvements, facilities and fixtures, and that no other person or persons have or then had any right, title, interest or estate in and to said lease and agreement except the defendants Concrete Ship Constructors, Lloyd S. Stroud, R. S. Seabrook, Stroud-Seabrook, C. M. Elliott, Carlos Tavares, Henry M. Page and Don F. Gates.

XI.

That the jury returned its Verdict herein, finding the just compensation for the condemnation and taking of Parcels 1, 2, 3, 5, 6, 7, 8, 9 and A and the just compensation for the condemnation and taking by plaintiff of all right, title and interest of defendants Tavares Construction Company, Inc., Concrete Ship Constructors, Lloyd S. Stroud, R. S. Seabrook, Stroud-Seabrook, C. M. Elliott, Carlos Tavares, Henry M. Page and Don F. Gates, in and to the real property designated as Parcels 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and A and hereinafter described, and all improvements, facilities and fixtures located thereon, and the option, leasehold and possessory rights granted to said last named defendants, or any of them, by that certain lease and agreement dated December 27, 1941, between Defense Plant Corporation and Tavares Construction Company, Inc., a corporation, as amended (commonly known as Plancor 407, as amended) to be as follows:

“In the District Court of the United States, in and for the Southern District of California, Southern Division.

United States of America, Plaintiff, vs. Certain Parcels of Land in the City of National City, County of San Diego, State of California; Tavares Construction Company, et al., Defendants. No. 248-SD Civil.

VERDICT

We, the Jury in the above-entitled cause, sworn and empanelled to determine just compensation for the condemnation [256] and taking of certain property herein involved, find the just compensation to be as follows:

Parcel 9 (known as the Johnson land) \$6,750.00

Parcels 1, 2, 3, 5, 6, 7, 8 and A (known
as the City of National City land) . \$650,000.00

Out of which last named sum we allocate
to the San Francisco Bridge Company
as just compensation for the con-
demnation and taking of its leasehold
interest \$50,000.00

To Tavares Construction Company, Inc.,
a corporation, Concrete Ship Con-
structors, a joint venture, Lloyd S.
Stroud, R. S. Seabrook, C. M. Elliott,
Carlos Tavares, Henry M. Page, Don
F. Gates and Stroud-Seabrook, a co-
partnership, for the condemnation and
taking of all their interests under the
agreement of December 27, 1941
(known as Plancor 407, as amended) \$ 0

Dated: San Diego, California, February 27,
1947."

That said Verdict is in proper form in law, and judg-
ment should be entered thereon in favor of the parties in
interest.

It Is Therefore Ordered, Adjudged and Decreed:

1. That the Verdict of the jury dated and returned February 27, 1947, be enrolled in the records of this proceeding of this court relating to this cause:

2. That the just compensation for the condemnation and taking by plaintiff of the real property hereinafter described and designated Parcel 9, including all improvements located thereon, and all compensable interest therein, and for the use of said property from the date of entry into possession thereof by plaintiff, United States of America, or its [257] agent, until the date of the filing of said Declaration of Taking No. 1 and deposit of the estimated just compensation for said property, is the sum of Six Thousand Seven Hundred Fifty Dollars (\$6,750.00); and that the defendants herein, as their interest may be determined by the court, have judgment against plaintiff in that amount, together with interest as hereinafter specified; and it appearing that on the 3rd day of October, 1944, the sum of Twenty-One Hundred Dollars (\$2100.00) was deposited in the Registry of this Court as the estimated just compensation for the taking of said Parcel 9; and that on the 8th day of April, 1947, said estimated compensation was increased by Thirteen Hundred Forty-Eight Dollars (\$1348.00) to Thirty-Four Hundred Forty-Eight Dollars (\$3448.00); and that there is a deficiency of Thirty-Three Hundred Two Dollars (\$3302.00) in the sum deposited as said estimated just compensation, it is ordered that the plaintiff, United States of America, deposit in the Registry of this Court for the persons entitled thereto said deficiency in the sum of Thirty-Three Hundred Two Dollars (\$3302.00) together with interest at the rate of 6% per annum on the sum of Six Thousand Seven Hundred Fifty Dollars

(\$6,750.00) from November 10, 1942, the date the United States entered into possession of said real property, until October 3, 1944, the date of the filing of Declaration of Taking No. 1 and of the deposit of said sum of Twenty-One Hundred Dollars (\$2100.00); together with interest at the rate of 6% per annum on the sum of Four Thousand Six Hundred Fifty Dollars (\$4,650.00), from October 3, 1944, to the 8th day of April, 1947; and together with interest on Thirty-Three Hundred Two Dollars (\$3302.00) from the 8th day of April, 1947, to the date of the deposit of said deficiency into the Registry of this Court.

3. That the sum of Thirty-Four Hundred Forty-Eight Dollars (\$3448.00) now on deposit in the Registry of this Court, as the estimated just compensation for the taking of said Parcel 9, be paid forthwith by the Clerk of this Court as follows:

(a) To the Auditor of San Diego County, the sum of \$45.99, in full satisfaction of defendant County of San [258] Diego's interest in and to said Parcel 9;

(b) To defendants Carl A. Johnson and Pearl Johnson, the sum of \$3392.01, in partial satisfaction of their interest in and to said Parcel 9;

4. That upon deposit of said deficiency of Thirty-Three Hundred Two Dollars (\$3302.00), together with the interest hereinabove specified in paragraph 2, it is ordered that said deficiency and interest be paid to defendants, Carl A. Johnson and Pearl Johnson;

5. That the just compensation for the condemnation and taking by plaintiff of the real property hereinafter described and designated as Parcels 1, 2, 3, 5, 6, 7, 8 and

A, including all improvements thereon, and all compensable interest therein, and for the use of said property from the date of entry into possession thereof by plaintiff, United States of America, or its agent, until the dates of the filing of the said Declaration of Taking No. 1 and Amended Declaration of Taking, and deposit of the estimated compensation for said property, is the sum of Six Hundred Fifty Thousand Dollars (\$650,000.00), and that the defendants herein, as their interests may be determined by the court, have judgment against plaintiff in that amount, together with interest as hereinafter specified; and it appearing that the sum of Three Hundred Ten Thousand Four Hundred Seventy-Five Dollars (\$310,475.00) has heretofore been deposited into the Registry of this Court as the estimated just compensation for the taking of said parcels, and that there is a deficiency in the sum of Three Hundred Thirty-Nine Thousand Five Hundred Twenty-Five Dollars (\$339,525.00) in the sum deposited as estimated just compensation for the taking of said parcels; it is ordered that plaintiff, United States of America, deposit into the Registry of this Court for the benefit of the persons entitled thereto said deficiency in the sum of Three Hundred Thirty-Nine Thousand Five Hundred Twenty-Five Dollars (\$339,525.00), (together with interest at the rate of 6% per annum on the sum of Six Hundred Fifty Thousand Dollars (\$650,000.00) from November 10, 1942, the date the United States entered into possession thereof, [259] to October 3, 1944, the date of the filing of Declaration of Taking No. 1 and of the deposit of One Hundred Six Thousand Two Hundred Forty Dollars (\$106,240.00) in the Register of this Court); with interest at the rate of 6% per annum on the sum of Five Hundred Forty-Three Thousand Seven Hundred Sixty Dollars (\$543,760.00)

from October 3, 1944, to December 23, 1944, the date of the filing of the Amended Declaration of Taking and of the deposit of the additional sum of Fifty-Five Thousand One Hundred Ten Dollars (\$55,110.00) in the Registry of this Court; with interest at the rate of 6% per annum on the sum of Four Hundred Eighty-Eight Thousand Six Hundred Fifty Dollars (\$488,650.00), from December 23, 1944, to April 8, 1947, the date of the deposit of the additional sum of \$149,125.00 and with interest at the rate of 6 per cent per annum on the sum of Three Hundred Thirty-Nine Thousand Five Hundred Twenty-Five Dollars (\$339,525.00) from April 8, 1947, to the date of the deposit of said deficiency into the Registry of this Court;

6. That the amount of Three Hundred Ten Thousand Four Hundred Seventy-Five Dollars (\$310,475.00) heretofore deposited into the Registry of this Court as estimated compensation has heretofore, by order of this Court entered on the 18th day of April 1947, been distributed to the persons entitled thereto, which Order of Distribution is confirmed.

7. That on deposit in the Registry of this Court of the said deficiency of Three Hundred Thirty-Nine Thousand Five Hundred Twenty-Five Dollars (\$339,525.00), as hereinabove specified in paragraph 5, it is ordered that said sum be paid as follows:

(a) To defendant San Francisco Bridge Company the sum of \$26,118.00

(b) To defendant City of National City the sum of \$339,525.00

and that on deposit of the interest hereinabove specified in paragraph 5, it is ordered that said interest be paid to

defendant City of National City and defendant San Francisco Bridge Company in the following proportions: [260]

(1) To defendant San Francisco Bridge Company, one-thirteenth ($1/13$);

(2) To defendant City of National City, twelve-thirteenths ($12/13$'s);

8. That all claims, liens, taxes and assessments against said Parcels 1, 2, 3, 5, 6, 7, 8, 9 and A, and the claim for the award of just compensation for the condemnation and taking of the same are transferred from said parcels to the money deposited and to be deposited in the Registry of this Court to the end that the title of United States of America to said parcels of land, pursuant to Declaration of Taking No. 1 hereinbefore referred to, and Amended Declaration of Taking hereinbefore referred to, shall be free and clear thereof, and the United States of America shall be and is hereby released and discharged from liability to any person or persons whatsoever for such liens, claims, assessments and taxes against said parcels, including the award of just compensation, which liability shall thereupon attach solely to and be satisfied out of said funds so deposited and to be deposited, for and on account of the award of just compensation heretofore made by this Court;

9. That pursuant to Declaration of Taking No. 1 filed by plaintiff herein on October 3, 1944, there became vested in the United States of America on said date the full and indefeasible fee simple absolute title to the said Parcels 2, 3, 5, 6, 7, 8, 9 and A, including all improvements, facilities and fixtures located thereon; that pursuant to the Amended Declaration of Taking filed by plaintiff herein on December 23, 1944, there became

vested in the United States of America on said date the full and indefeasible fee simple absolute title to said Parcel 1, including all improvements, facilities and fixtures located thereon;

10. That the just compensation for the condemnation and taking by plaintiff of all right, title, and interest of defendants Tavares Construction Company, Inc., Concrete Ship Constructors, Lloyd S. Stroud, R. S. Seabrook, Stroud-Seabrook, C. M. Elliott, Carlos Tavares, Henry M. Page and Don F. Gates, in and to the real property designated as [261] Parcels 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and A and hereinafter described, and all improvements, facilities and fixtures located thereon, and the option, leasehold and possessory rights granted to said last named defendants, or any of them, by that certain lease and agreement dated December 27, 1941, between Defense Plant Corporation and Tavares Construction Company, Inc., as amended (commonly known as Plancor 407, as amended), is nothing:

11. That all right, title and interest of defendants Tavares Construction Company, Inc., Concrete Ship Constructors, Lloyd S. Stroud, R. S. Seabrook, Stroud-Seabrook, C. M. Elliott, Carlos Tavares, Henry M. Page and Don F. Gates, in and to the real property designated as Parcels 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and A and hereinafter described, and all improvements, facilities and fixtures located thereon, and the option, leasehold and possessory rights granted to said last named defendants, or any of them, by that certain lease and agreement dated December 27, 1941, between Defense Plant Corporation and Tavares Construction Company, Inc., as amended (commonly known as Plancor 407, as amended), have become and are hereby vested in the United States of America;

12. That there is vested in the persons entitled thereto, as their respective interests may appear and be established, the right to just compensation heretofore fixed by the Verdict of the jury hereinbefore set forth for the lands referred to in said Verdict and hereinabove described, and for all compensable interests therein;

13. The Court is apprised of pending negotiations which contemplate the exclusion from the proceeding and revesting title in the former owners of a portion of the City of National City land, and this judgment is entered without prejudice to the rights of the proper parties to stipulate for such exclusion and revesting.

14. That this Court retains jurisdiction hereof for the purpose of making such further orders, judgments and decrees as may be necessary in the premises, including adjudication of the rights of the respective parties or claimants in and to all funds deposited and to [262] be deposited in the Registry of this Court by plaintiff in satisfaction of the award and judgment made herein.

Dated: This 6th day of June, 1947.

PAUL J. McCORMICK

United States District Judge

Approved as to form as provided by Rule 8: James M. Carter, United States Attorney; C. U. Landrum, Special Assistant to the Attorney General; Robert G. Berrey, Special Attorney; by Robert G. Berrey, Attorneys for Plaintiff, United States of America. Hunter M. Muir, Attorney for Defendants Carl A. Johnson and Pearl Johnson. Monroe & McInnis, Jean Daze Ratelle, and Campbell & Campbell, by C. M. Monroe, Attorneys for Defendant City of National City. John M. Martin, Frank L.

Martin, Jr., and Charles C. Crouch, by _____,
Attorneys for Defendants Tavares Construction Com-
pany, Inc., a corporation, Concrete Ship Constructors, a
joint venture (sued herein as Doe One), Stroud-Seabrook,
a copartnership (sued herein as Doe Two), Lloyd S.
Stroud (sued herein as Doe Three), R. S. Seabrook (sued
herein as Doe Four), C. M. Elliott (sued herein as Doe
Five), Carlos Tavares (sued herein as Doe Six), Henry
M. Page (sued [263] herein as Doe Seven), and Don F.
Gates (sued herein as Doe Eight). H. G. Sloane, Attor-
ney for Defendant San Francisco Bridge Company, a
corporation. Leonard McLachlan (sued herein as Leonard
McLaughlin), Defendant in Propria Persona. Fred N.
Howser, Attorney General, and L. G. Campbell and John
F. Hasslen, Jr., By _____, Attorneys for De-
fendant State of California. James Don Keller, District
Attorney, and Duane J. Carnes, Deputy District Attor-
ney, by Duane J. Carnes, Attorneys for Defendant County
of San Diego. [264]

The real property hereinbefore referred to and desig-
nated as Parcels 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and A are
situate in the City of National City, County of San Diego,
State of California, and are particularly described as
follows:

Parcel 1. [Description not printed as it is same as set
forth in Complaint on page 6.]

Parcel 2. [Description not printed as it is same as set
forth in Complaint on page 7.]

Parcel 3. [Description not printed as it is same as set forth in Complaint on page 7.] [265]

Parcel 4. [Description not printed as it is same as set forth in Complaint on page 8.] [266]

Parcel 5. [Description not printed as it is same as set forth in Complaint on page 9.]

Parcel 6. [Description not printed as it is same as set forth in Complaint on page 10.] [267]

Parcel 7. [Description not printed as it is same as set forth in Complaint on page 10.]

Parcel 8. [Description not printed as it is same as set forth in Complaint on page 11.] [268]

Parcel 9. [Description not printed as it is same as set forth in Complaint on page 11.]

Parcel 10. [Description not printed as it is same as set forth in Complaint on page 12.] [269]

Parcel 11. [Description not printed as it is same as set forth in Complaint on page 13.] [270]

Parcel A. [Description not printed as it is same as set forth in Amendment to Complaint on page 24.]

Judgment entered Jun. 6, 1947. Docketed Jun. 7, 1947. C. O. Book 12, page 518. Edmund L. Smith, Clerk; by John A. Childress, Deputy.

[Endorsed]: Filed Jun. 6, 1947. Edmund L. Smith, Clerk. [271]

[Title of District Court and Cause]

MOTION FOR NEW TRIAL

Defendants, Tavares Construction Company, Inc., a corporation, Concrete Ship Constructors, a joint venture, Lloyd S. Stroud, R. S. Seabrook, C. M. Elliott, Carlos Tavares, Henry M. Page, Don F. Gates, and Stroud-Seabrook, a copartnership, move the Court for a new trial in the above entitled proceeding upon the following grounds:

1. Errors in law occurring at the trial, and especially in the particulars specified in paragraphs 1 and 2 of the Memorandum of Points and Authorities attached hereto and made a part of this Motion by reference.
2. Irregularity in the proceedings of the Court, jury and the adverse party and orders of the Court and abuse of discretion by which defendants were prevented from having a fair trial.
3. The verdict is against law. [272]
4. Insufficiency of the evidence to justify the verdict, and especially in the particulars specified in paragraph 5 of the Memorandum of Points and Authorities attached hereto and made a part of this Motion by reference.
5. Inadequate damages appearing to have been given under the influence of passion or prejudice.
6. Accident or surprise which ordinary prudence could not have guarded against.

Said Motion will be based upon the files and records in the case, the exhibits, the minutes of the court, the tran-

script of the testimony, the affidavits served and filed herewith, and the Memorandum of Points and Authorities attached hereto and made a part hereof.

Dated this 6th day of June, 1947.

CHARLES C. CROUCH
JOHN M. MARTIN
FRANK L. MARTIN, JR.

Attorneys for Tavares Construction Company, Inc., a corporation, Concrete Ship Constructors, a joint venture; Lloyd S. Stroud, R. S. Seabrook, C. M. Elliott, Carlos Tavares, Henry M. Page, Don F. Gates, and Stroud-Seabrook, a copartnership. [273]

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION FOR NEW
TRIAL

1. Erroneous and misleading instructions.

(a) The Court instructed the jury:

“* * * and in this connection if you find that the interest of the Tavares Construction Company and its associates under said instrument of agreement is so speculative and conjectural that no purchaser in the open market would have purchased the same except for a nominal consideration then your verdict as to the interest of the Tavares Construction Company and the Concrete Ship Constructors herein must be in a nominal figure only.”

The above instruction is clearly erroneous. By it a question of law was left for the jury to determine, to wit: the interpretation of a contract. In other words, instead

of the jury being called upon to determine the market value of an interest in land, they were called upon to determine whether or not defendants had any interest at all in the land, a question which the court had already determined upon pretrial in favor of defendants.

(b) The Court instructed the jury:

“Evidence has been received in this case with relation to the interest of the defendant, Tavares Construction Company, Inc. That interest arises out of an instrument which is in evidence as defendants’ ‘Exhibit W’. That instrument is a lease coupled with an option. In your consideration of that feature of the case you will proceed in the same manner as you proceed as to the market value of the land, the question being what could it have been sold for on the [274] open market for cash on December 23, 1944, the date it was taken or canceled by this proceeding, or shortly thereafter, above what Tavares Construction Company, Inc. would have to have paid under all its terms and conditions. If you find the company could have made such a sale your verdict will be for the amount you in your judgment determine the company could have gotten for it. You will consider the entire instrument, not just parts of it. If you find it could not have been sold, then your verdict as to Tavares Construction Company, Inc. will be zero. (underscoring ours)

The above instruction is clearly erroneous and very misleading. It was the last one given to the jury and hence was foremost in their minds.

By it the jury were told by the Court that the agreement was canceled by this proceeding, which meant that there would be nothing left to sell.

Next the jury were instructed that the market value of the agreement was what it would sell for above what Tavares would have to have paid under all its terms and conditions. This unquestionably conveyed to the jury the idea that the agreement would have to sell for approximately \$3,000,000 in order for the jury to allow Tavares \$500,000.

The underscored portion of the foregoing instruction reading—

“above what Tavares Construction Company, Inc. would have to have paid under all its terms and conditions.”

was very prejudicial because it was entirely erroneous as applied to the obligations of Tavares under the Lease as a whole.

Under Exhibit W Amendment of November 11, 1942 Paragraph 31 the jury were told (in effect) that if they rendered verdict in favor [275] of landowners, that said sum plus interest would represent the acquisition cost of the site and that the amount of such acquisition cost would be added to the amount which Tavares was required to pay to Defense Plant Corporation as rental.

The jury did not know from any evidence in the case, nor were they informed by the Court, that the amount of the acquisition cost of the site was a reimbursable item of expense to Tavares under its contracts with the Government for construction of ships. (See Agreements on file and attached to Amended Declaration of Taking.)

For the Court to instruct the jury that the question was what the Lease (Exhibit W) could have been sold for above what Tavares would have to have paid under all its terms and conditions was the same as telling the jury that it had to be sold for more than the acquisition cost (which the jury found to be \$650,000). This was not true because the acquisition cost referred to in Paragraph 31 of the Lease Amendment of November 11, 1942 was to be added as rental and by separate contract with the Government was reimbursable by the Government to Tavares.

What the Court had in mind may have been proper. That is to say, the Court may have had in mind only the obligation of Tavares as to the amount to be paid as the option price but what the instruction actually says is would have to have paid under all its (Exhibit W) terms and conditions. Had the Court told the jury the value of the option was the amount for which the shipyard could be sold over and above the option price, its instruction would have been clear and correct. Had the Court told the jury that the market value of the Lease and Option was the amount for which it could be sold without addition of the qualifying words above what Tavares would have to have paid, the instruction would have been clear. It would, however, have been correct only in the event Tavares, et al. are limited to recovery of market value of a chose in action against the plaintiff. This measure of recovery we will later discuss as we deem it less than [276] just compensation in a case of this kind.

Lastly the jury were instructed that if they found that the Agreement could not be sold, then their verdict will be zero. This was the last instruction to the jury and no

doubt remained foremost in their minds. By this last instruction, the jury had to first determine whether or not the agreement could be legally sold. By the terms of the agreement, it could not be assigned without the prior consent of the Defense Plant Corporation and the Maritime Commission. The evidence does not show such consent was obtained. It is therefore evident that the jury determined that the agreement could not be sold, not because it had no market or other value, but because of its provisions against the transfer thereof. Their verdict for zero confirms this, otherwise they would have brought in a verdict for some amount, as obviously the lease had some value.

This erroneous and misleading instruction has resulted in a gross miscarriage of justice. Actually the Court instructed the jury to bring in a verdict of zero for Tavares. If such an instruction was proper as to Tavares, then a similar instruction should have been given as to National City, as its tidelands could not be sold, and the verdict as to National City would have been zero. The same appraisers who testified as to values for National City also testified as to values for Tavares. The jury accepted the opinions of these appraisers for National City. It is evident that the only reason the jury did not accept the opinions of these same appraisers for Tavares is because of the above erroneous instructions.

At page 1073 of the Transcript the Court made a preliminary statement to the effect that the date of taking as to all interests other than Tavares was November 10, 1942. However, as shown by the Affidavit of Frank L. Martin served herewith, the Court later concluded to submit to the jury the question as to date of taking as to Parcel A for the reason that an issue of fact was there

involved. The Court instructed the jury in this respect (Tr. p. 1257) as follows: [277]

“If you find that the condemnation and taking by plaintiff United States of America of Parcel A herein was a part of the same project for which the other lands herein have been condemned and taken by the United States of America, and that it was certain on November 10, 1942, that Parcel A would be condemned and taken as a part of the same project for which the other lands herein condemned have been taken, then and in that event you must evaluate Parcel A in the same manner and use the same date of valuation as if Parcel A had been included in the original complaint for condemnation filed herein November 10, 1942.”

The Court, however, did not instruct the jury as to the date of taking or valuation in the event it found that the taking of Parcel A was not a part of the project for which the other lands were taken. Tavares's option price could only be determined by calculating interest on the award as to Parcel A from the date of taking to the date of judgment. The basic facts upon which the judgment in favor of the landowners can properly be calculated are not now known, as the issue as to date of taking has never been determined. It is only by assuming that the jury found that the taking of Parcel A was a part of the same project for which the other lands were taken, that a judgment in favor of the landowners can now be entered upon the verdict as rendered. There exists no legal right to make any such assumption. The Court having submitted this question as to date of taking of Parcel A to the jury, erred in discharging the jury without requiring it to make a finding as to date of taking Parcel A.

The value of Tavares's option, exclusive of any possessory rights under the Lease, was the difference between the option price and what the shipyard could be sold for as of December 23, 1944.

In order for the jury to determine the option price of the shipyard it was necessary that it first know the date of taking of [278] Parcel A. Without such knowledge it could neither intelligently nor accurately determine the acquisition cost of Parcel A which was a substantial portion of the shipyard site.

The jury having failed to find as to the date of taking of Parcel A and the Court having failed to instruct the jury definitely as to the date, it is apparent that the jury could not have based its verdict of zero upon any finding or decision as to the date of taking of Parcel A.

Therefore, it was impossible for the jury to determine the difference between the option price at which Tavares could have purchased the shipyard and the price at which it could have been sold as of December 23, 1944 and in that manner arrive at the fair market value of the option feature of the Tavares Leasehold Estate. By the Court's ruling upon pre-trial, the option feature of the Lease was held to be compensable and properly taken into consideration in arriving at the market value of the Tavares Leasehold Estate.

If by this action in eminent domain the Government can deprive Tavares of its right to enforce the terms of its option and the right it would otherwise have to sue in the Court of Claims upon the option contract for the recovery of damages and at the same time instruct the jury that its verdict shall be zero in the event it finds that the option could not be sold, then with this case as a

precedent the Attorney General of the United States can, immediately and without the payment of any compensation to any claimant, obtain a dismissal of every suit now pending in the United States Court of Claims or that may hereafter be filed in said Court for damages for breach of contract.

In order to defeat such actions in the Court of Claims it will only be necessary for the Government to proceed as follows:

First: By eminent domain condemn or by requisition acquire the basic contract upon which such action in the Court of Claims is founded. [279]

Second: In the eminent domain action point out that contracts with the United States Government are not assignable without the consent of the Government and that such consent has not been given.

Third: Have the Court in which the condemnation case is tried instruct the jury that if it finds that the contract could not be sold, that its verdict should be for zero.

Inasmuch as such Government contracts can neither be sold, assigned, nor any right of action thereon maintained as against the Government in the name of an assignee, we find that payment of just compensation for the taking in eminent domain can not only be avoided but that all right of redress thereon be defeated if what has heretofore happened in the instant case can be repeated in other cases.

The real trouble in the instant case is that the Government has proceeded to condemn and acquire not merely Tavares's interest in the land, but also Tavares's chose in action based upon the Option. This chose in action the

Government did not need. No public necessity existed for its condemnation. It was a right of action personal to Tavares. What justification has been established for its taking? The Government did not need it for any public use. It should have taken only that part of the Leasehold Estate required by public necessity. It should have excluded the Option to Purchase from the taking. It knew that if it did so, Tavares would elect to purchase as soon as the fee title had been acquired by the Government. It sought by this action not only to condemn what it needed for public Governmental use, but also to acquire Tavares's Option upon which the optionee might otherwise have founded an action in the Court of Claims had the Government failed to deliver fee title to the shipyard in conformity with its contract commitment.

Government counsel has not advanced nor does the evidence show one single reason why there exists any public necessity or other ground for condemning the Tavares Option. The right of possession to and quiet title of the shipyard could have been obtained in this case [280] without including a condemnation of the Option to Purchase. That is all the Government needed and the Tavares option rights could then have been adjudicated in the United States Court of Claims where damages for breach of contract would in no manner be dependent upon or measured by the rule of market value as normally applied in eminent domain cases.

Had such option been eliminated from the present taking and Tavares filed suit for damages, the Court of Claims would have allowed just compensation without regard as to whether the option could be sold or had any market value. In fact, one of the very objects of requiring suits in the Court of Claims to be filed in the name

of the original contracting party or claimant is to prevent their having any market value. In other words, to prevent the barter and sale of claims against the Government.

It was not until the assignment of Claims Act in 1940 that Congress even permitted an assignment of monies to be paid under a Government contract, and even those cases do not permit the assignment of the basic contract with the Government.

Were Tavares prosecuting an action in the Court of Claims for just compensation for breach of the Option to Purchase, the fact that no prospective purchaser could be found who would or could purchase the option contract would be neither material to the issue of amount of damages nor operate as a defense to the Government. In such a case it might be conceded that Tavares could not sell his option, even with the consent of the Government, for more than ten thousand dollars and that its right of recovery was doubtful, and yet if as a result of a trial upon the merits the Court of Claims found that the actual damages sustained by breach of the option were one million dollars, Tavares would still recover judgment for the full amount of the actual damages sustained.

In other words, the admitted fact that no one wants to buy a contested claim or lawsuit against the Government is immaterial to [281] and no criterion of a claimant's right to recover judgment. Though every potential buyer for the option declined to pay any substantial sum for the option and Tavares were to decline to sell the option at any price, proof thereof would be wholly immaterial to Tavares's right to recover damages for breach of the option contract.

The Government having elected to acquire the Tavares option rights in the instant case, this Court should follow

the same rules as to determination of just compensation as though the Government had filed its Declaration of Taking but filed no action to condemn and Tavares were before the Court of Claims seeking just compensation. Admittedly the Court of Claims would not follow the rule of market value and it is doubtful if that Court would even permit either party to prove either that the option had or did not have a market value.

Certainly in such a case the Government would not be bound nor would the Court of Claims render judgment against the Government upon mere proof that the option had a market value.

As shown by the Answer, Counter-Claim and Cross-Claim of Tavares, et al., filed May 3, 1945, it is alleged at Paragraphs IV, V, VI and VII thereof as follows:

“IV

That defendant City of National City herein has attempted to oust the jurisdiction of this Court and nullify this Court's Order of Possession by the commencement of an independent action against these answering defendants in the Superior Court of the State of California in and for the County of San Diego, being an action entitled “City of National City, a municipal corporation, Plaintiff, vs. Tavares Construction Company, Inc., a corporation, et al., Defendants” No. 121165, and filed August 25, 1944. That in said Superior Court action the defendant City of National City seeks to recover the sum of \$76,346.29 from these answering defendants for the use of said premises during the period commencing at the time [282] plaintiff took possession of said premises pursuant to the Order of Possession issued

by this Court in the above entitled cause on November 10, 1942, to the date of the filing of said Superior Court action, and for further amounts which it alleges will accrue after the commencement of said action, and has caused a Writ of Attachment to be issued and levied on moneys belonging to these answering defendants.

V.

That in order to avoid a multiplicity of actions and to enable this Court to properly administer its Order of Possession and to do equity herein, this Court should fully determine in this action the respective rights of all parties thereto. These answering defendants allege that the plaintiff took possession of the premises described in the Amended and Supplemental Complaint under and by virtue of the authority granted by the Second War Powers Act approved March 27, 1942 (Public Law 507, 77th Congress) and that the Order of Possession dated November 10, 1942, and the Order of Possession dated September 23, 1944, confirmed and conferred the legal right of possession of each and all of the premises described in the Amended and Supplemental Complaint upon the plaintiff, and that the plaintiff, acting through the defendant, Defense Plant Corporation, had by the aforesaid written lease dated December 27, 1941, and the amendments thereto granted the Tavares Construction Company, Inc. exclusive possession of said premises.

VI.

That by the terms of the written contracts for the construction of ships and repair of ships entered in-

to subsequent to November 10, 1942 between United States Maritime Commission, the Navy Department and the War Department, acting for and on behalf of the plaintiff, and these answering defendants, the plaintiff has represented that it owned said premises and [283] agreed that the use and occupancy of all of said premises by these answering defendants would be without rental or other charge.

VII.

That the sole right of the defendant City of National City and each and all of the other cross-defendants to recover compensation for the use of the premises described in the Amended and Supplemental Complaint during the period subsequent to November 10, 1942, being the date of entry of this Court's Order of Possession as to Parcels Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11, and the date of the actual taking of Parcel A, is to seek an award herein against the plaintiff for compensation for the use of said premises during said period of advance possession. These answering defendants seek a decree herein as against all of the parties herein so adjudicating the rights of these defendants."

At Paragraph 4, page 7, of the above quoted Answer, Counter-Claim and Cross-Claim, Tavares, et al. pray for judgment as follows:

"4. That there is no rent or other compensation due from any of these answering defendants to either the plaintiff or to any of the cross-defendants on account of the use and occupancy of any of the premises described in the Amended and Supplemental Complaint subsequent to November 10, 1942."

The Court having submitted to the jury as an issue of fact the question as to date of taking of Parcel A, there is no way by which the Court can legally render judgment upon the issues raised by the above quoted portions of the pleadings until such issue of fact has been determined by the jury.

Under the instructions as given and the rulings as made the real issue in this case was not open to decision by the jury upon its [284] merits and a new trial should be granted.

The failure of the jury to determine the date of taking as to Parcel A is prejudicial to Tavares, et al. for the additional reason that the date being undetermined, there is now no legal basis upon which the Court can by its judgment herein decree either the date from which interest shall run as to Parcel A or the amount of the lump sum verdict of \$650,000 to be allocated to Parcel A for the computation of interest allowed. Nor can the Court fix the date when the defendant landowners ceased to have the right of use, occupancy or possession of Parcel A or the right to compensation or rental from Tavares, et al. in lieu thereof.

2. Error in Rulings on the admission of evidence and orders of the Court by which defendant was prevented from having a fair trial.

(a) The Court erred in admitting in evidence Plaintiff's Exhibits 2 and 3 relating to the intent of the Navy to take the Tavares agreement by this condemnation action and the Tavares offer of settlement. This was clearly an offer of compromise of the very taking involved in this action and was very prejudicial to defendants' rights.

Counsel for plaintiff commented on it repeatedly, and plaintiff's appraisers took into consideration the fact that the Navy was going to take the property.

(b) There is one right which counsel for defendants understood was acquired by this action, but as to which the court ruled counsel could offer no evidence. That is the right to sue the Government in the Court of Claims for breach of the agreement of lease by this proceeding.

Plaintiff's witnesses were permitted to testify that the option could be canceled any time by the Government requesting priority and never came into being because it was canceled by this condemnation action and therefore gave it no value. (Tr. 917; 956-971; 1018-1019; 1043-1044.) If they were correct in their interpretation [285] of the Lease and the law applicable thereto, then Tavares would except for the acquisition by plaintiff herein of said Lease and Option, have been entitled to sue in the United States Court of Claims for damages for breach of contract. This right of Tavares to sue in its own name was a valuable right and this defendant should have been permitted to offer evidence as to the value thereof. This the defendant was not permitted to do. (Tr. 401 to 405; 433 to 437.) Had such evidence been received it would have been a complete answer to the contention and evidence of the plaintiff that the option never came into being. This exclusion of such evidence was prejudicial error.

As to whether the option had come into being was a matter of law upon which the Court should have instructed the jury. Thus, while the Government and its witnesses were permitted to argue legal conclusions, counsel for Tavares was told that he would not even be permitted to talk about the Court of Claims. (Tr. 404.) In other

words the plaintiff is condemning a chose in action (right to sue in Court of Claims for damages for breach of contract) and yet defendant was not permitted to even tell the jury of such right or prove the value thereof.

The fact that the Government has selected this Court as a forum in no manner alters the fact that counsel for Tavares should have been permitted to tell the jury both orally and by evidence of its expert witnesses that among the grounds for their opinion as to value was the fact that even though Tavares could not sell or assign its option contract, Tavares did have, so long as it retained said option, a right to sue in the Court of Claims in its own name for damages equal in amount to the difference between the market value of the shipyard on December 23, 1944 and the option purchase price as of that date. The various elements which each expert witness included in his valuation were properly the subject of proof. Tavares was precluded from making such proof and in the proper conduct of its counsel obeyed the admonition of the Court and refrained from attempting such proof or speaking in the presence of the jury con- [286] cerning such proof.

The Court told the jury that when we are considering so-called expert testimony, the opinion which the witness gives is only as strong as the reasons which he assigns for that opinion, and yet counsel for Tavares was told by the Court, at the insistence of Government counsel, (Tr. 401 to 405; 433 to 437) that he would not be permitted to talk about the Court of Claims. As shown by affidavit of John M. Martin served herewith that meant to counsel for Tavares that it would be contrary to the Court's ruling and admonition for counsel to interrogate the witness then on the stand as to whether he had taken

into consideration, in forming his opinion as to value, the right of Tavares to sue in the Court of Claims for damages for breach of contract. The strength of the opinions of the witnesses who testified as to value for Tavares was accordingly greatly reduced. In fact the jury was at no time made aware of the existence of such a right of action in the Court of Claims.

3. Misconduct on the part of Mr. Landrum, Counsel for Plaintiff, which prevented defendant Tavares from having a fair trial.

(a) Mr. Landrum in his argument to the jury referred to Exhibits 2 and 3 and made the following statements in regard thereto.

(1) "Now, they knew, therefore on the 21st day of November 1944, that the Government was going to request priority for the Navy Department, and this Exhibit W says in one of those last paragraphs that it is contemplated they do that." (Tr. pg. 1192.)

Such statement is contrary to the evidence. The paragraph referred to is Twenty-six, which merely permits Defense Plant Corporation to transfer its rights as lessor to another branch of the [287] Government. Plaintiff's Exhibits 2 and 3 do not indicate that the Navy was going to request priority to use the shipyard as a shipyard as provided by paragraph Fourteen (b) but the Navy was going to take the property for some other purpose which would involve the taking of all of Tavares's rights under the Agreement. In other words, Mr. Landrum injected into the jury's mind the fact that no one would buy the Agreement because it was going to be condemned and all the purchaser would get would be a lawsuit instead of a

shipyard. Such an argument is clearly contrary to the law, as no prospective purchaser who wanted the property for a shipyard would buy it for use as a shipyard if he knew it was going to be condemned. He could just as legally have argued that San Francisco Bridge Co. could not have sold its lease to another dredging company because they knew it was going to be condemned and the purchaser would never get to use the property in his business.

(2) Mr. Landrum further stated in his argument:

“Ladies and gentlemen, you are not going to give them more than they asked for, are you, before this lawsuit was brought? And don’t forget that was only their asking price then.” (Tr. pg. 1192.)

Through the error in admitting Plaintiff’s Exhibits 2 and 3 in evidence, Mr. Landrum was enabled to comment on the compromise price. However, he went clear beyond that and stated that defendants had in fact received all of the considerations contained in the offer of compromise except the \$80,000, and even inferred that they may have received the alternative to that. (Tr. pg. 1193-1194.) These were matters which counsel for defendant was prohibited from going into during the trial because they were after the date of December 23, 1944. (Tr. pg. 510 to 518.)

(b) Mr. Landrum further stated in his argument:

“Whatever else may be said, Mr. Tavares is a capable business man. He cut himself in to this war-time Garden of Eden without the [288] expenditure of a penny. He built concrete barges for the Government of the United States at a profit, and now he

asks you to put your hands into the pockets of the people of the United States and to give him a half a million more." (Tr. pg. 1180.)

* * * * *

"But, my goodness, are you going to permit those people to go into the treasury of the United States, when we come in here in a condemnation case, and get more?" (Tr. pg. 1194.)

"Well if you think they are entitled to that you give it to them. But if you think that it would be right for me to say to you 'I want to get some money out of this war business. I want you to spend \$2,700,000 to build me a shipyard to build concrete ships to sell to you at a profit, and then after it is all through and done, I want you to give me \$80,000 for building my own shipyard, and supervising that, and then on top of that I have taken the expense, I have taken the vacations for my own office force.'" (Tr. pg. 1195.)

There is no evidence that Tavares expended no money of his own, nor as to whether he made a profit or loss. It is all immaterial. However, the above statements were clearly made for the sole purpose of prejudicing the jury against Tavares.

(c) Mr. Landrum further stated in his argument:

"What they are actually doing, ladies and gentlemen, is coming into a condemnation case and trying to get damages against the Government of the United States for what [289] they claim is a violation of that contract." (Tr. pg. 1190.)

Such statement could only be calculated to convey to the jury the idea that the claim of Tavares was not compensable in this suit, although the Court had on pre-trial ruled that it was. This was clearly an argument of law to the jury and was prejudicial. Does not just compensation include damages, or does the word damages mean some kind of compensation in excess of what is just?

(d) Mr. Landrum further stated in his argument:

“* * * That lease, Mr. Hinder”—and I am talking about the Tavares Construction Company claim now—“That lease, Mr. Hinder, carries within it a paragraph that it cannot be assigned or pledged without the written consent of the Defense Plant Corporation or of the Maritime Commission. Mr. Hinder, would you pay anything for a lease which you couldn’t assign? Would you sign that lease which you couldn’t assign? Would you sign that lease? “Why, no, Mr. Landrum, I wouldn’t sign such a lease.”

“I give you that, ladies and gentlemen of the jury, on both claims, that you give to them some money for what they claim was a fee which they were to get for building a shipyard with Government money upon which they could build ships at a profit and sell them to the Government, and then ask you to give them \$500,000 on top of that.” (Tr. pg. 1175.)

* * * * *

“All right. Here is the thing that Mr. Hinder said was such that he never would have even signed this lease in the first place.” (Tr. pg. 1188.) [290]

* * * * *

"Twenty-four: Lessee will not without prior written consent of Defense Corporation and the approval of the Maritime Commission sell, assign, or pledge this lease or any of its rights or obligations hereunder, or sublease or permit the use by others of any of the property covered by this lease."

"Mr. Willing Buyer, I want to sell you this lease. I want to assign it. I want to sublet a part of it to you. What will you give me?"

"Why, Mr. Tavares, you can't do that without you get the consent of the Defense Plant Corporation and the Maritime Commission. I wouldn't give you five cents for it. How do you know they are going to let you make a profit on this paper? Is it reasonable to suppose after they put up for you \$2,700,000 and build you a shipyard, that they will permit you to go ahead and sell this paper? Do you not know that on the date of this lease it is indicated that the Navy of the United States proposes to take over those utilities?"

"Mr. Tavares told me that he thought that he could get the consent of the Defense Plant Corporation and the Maritime Commission for him to make another half a million dollars." (Tr. pg. 1189.)

All of the above was clearly the argument of law to the jury. It could only convey to the jury that there could be no sale of the agreement as a matter of law. However, for the purpose of determining the market value in this case, the jury was supposed to assume that there could be a sale and that the prior consent thereto had been given. This was clearly prejudicial, especially when

considered in the [291] light of the Court's last instruction: "If you find it could not have been sold, then your verdict as to Tavares Construction Company, Inc. will be zero." The Court should just as properly have instructed the jury as to National City, "If you find that National City could not have sold its tidelands, then your verdict will be zero." National City was prohibited by statute from making any sale of its tidelands, consent or no consent. If the Court had given such an instruction as to National City with the evidence in the record as to the prohibition against sale, the jury certainly would have brought in a verdict of zero as to National City. Such an instruction would clearly have been error. The same applies to Tavares.

(e) Mr. Landrum further stated in his argument:

"* * * But I say to you that the claim of Tavares Construction Company in this case goes out the window by virtue of evidence which you can see, which you can feel, and which will stand out before you like the tall pines in the forest of truth. Every claim that it has in this lawsuit stems from Exhibit W. I can say to you that, in reading that document, if you can tell me what it means, then you are probably a better man than I am. I tell you that, if the lawyers can agree on what that document means, they are better lawyers than I am. So, therefore their rights stemming from Plancor 407 are what you are to determine." (Tr. pg. 1181.) "* * * But, if you will go with me through Exhibit W, and then can say that you believe that, on the 23rd day

of December, 1944, any man would have bought that instrument, and paid its market value as they have contended for, I will be unable to follow you." (Tr. pg. 1182.) [292]

Mr. Landrum then went through parts of the agreement, argued the meaning thereof, making and advancing positions of law to the jury that he himself must have known were wrong, all with the apparent studied effort on his part to confuse the jury as to the very things that they were erroneously called upon to decide. He clearly indicated to the jury that the agreement was so uncertain that he did not understand it. He succeeded in so confusing the jury over his erroneous point of law that no one would or could buy it regardless of what it may have been worth, that the jury, in obedience to the Court's erroneous instruction, brought in a verdict of zero.

Actually there is nothing wrong with the agreement. Its terms are clear and understandable by any business person. True there are contingencies in it, but the rights of the parties are all specifically set forth with reference thereto, and capable of being appraised.

Possibly Mr. Hindes would not sign a lease with a provision in it against assignment, but plenty of others do.

All of these arguments made by Mr. Landrum regarding the agreement being indefinite, uncertain, speculative and conjectural were made in his objection to the receipt of any evidence with relation to the market value of the lease. In accordance with the Court's ruling with regard to such objection, counsel should not have argued these points of law to the jury. By his so doing, the jury was called upon to decide these very points of law that the

Court had, without the knowledge of the jury, already decided against counsel for Plaintiff. This was clearly misconduct on the part of Mr. Landrum, was prejudicial error and has resulted in a miscarriage of justice.

4. The verdict is against law.

The jury gave full credit to the witnesses for National City as to values. The same witnesses testified for Tavares Construction Company. Is it at all possible that the jury believed these witnesses 100% as to their testimony as to National City and [293] yet disbelieved them 100% as to their testimony as to Tavares? The only answer is that the jury must have based their verdict on some point other than market value.

Isn't Tavares entitled to something? He was in peaceful possession of the property, actually using it rent free, constructing ships for the Government and doing ship repair work. Is Exhibit W just a scrap of paper? Did Tavares not have any rights under it? We submit that he did have, that those rights were taken, and he is entitled to just compensation therefor. The Court so determined upon pre-trial.

It must be kept in mind that the Government here condemned its own contract. It in effect took back that which it gave Tavares in exchange for what Tavares gave to the Government. Even if we view it in the nature of a rescission, such could only be accomplished by making Tavares whole, by at least giving back to Tavares that which he parted with for the agreement, to wit, the National City lease on Parcel 1 and a fair supervisory fee for constructing the shipyard. Certainly just compensation for the taking of any right, no matter how small or

whether someone else would buy it, cannot possibly be zero.

If the Government can lawfully breach its own obligations under the guise of condemnation, the other party to the contract should still be entitled to just compensation for the loss sustained by such breach.

As such right of action was included within the taking by the plaintiff of the lease and option contract, evidence as to the value of such chose in action should have been received. Even though the right to sue in the Court of Claims was personal to the Tavares Construction Company and could not be sold, assigned nor enforced in the name of an assignee, it was error to instruct the jury that its verdict should be zero merely because the jury found that the lease and option could not be sold. [294]

5. The evidence does not justify the verdict.

The only evidence as to the market value of the leasehold estate of Tavares is that given by defendants' witnesses. Mr. Mueller and Mr. Anawalt both testified that the market value was \$500,000. Mr. Bleifuss said \$573,000. Mr. Hotchkiss said \$600,000. Mr. Tavares said \$750,000.

Plaintiff's witnesses both testified that the lease had no value. But cross-examination of Mr. Shattuck showed very clearly that his opinion was based upon his erroneous interpretation of the agreement, to the effect that he understood that the Government could cancel all of Tavares's

rights by merely requesting priority. (Tr. pg. 956, 958, 969, 971.) Cross-examination of Mr. Mason showed that he based his opinion as to no value upon his opinion that the agreement was too speculative because of the many ifs, ands and possibilities of this and that happening, such as the right to remain on the property and to an option being cut off by condemnation, upon his knowledge of what happened after the last war to another shipyard, realizing that we were out of war at the moment, (thereby basing his appraisal on 1947 conditions instead of 1944 conditions) that the lease had been canceled by this condemnation action and that there was no option to purchase. (Tr. pg. 1018-1019 and 1043-1044.)

Thus the opinions expressed by plaintiff's witnesses as to value being based upon erroneous legal interpretations of the contract and upon factors which it was erroneous for them to consider, they were entitled to no weight or consideration as evidence.

The verdict is therefore not supported by any evidence and is against the weight of the evidence.

6. Inadequate Damages.

The verdict of zero in this case is a miscarriage of justice. How could anyone possibly say, in view of all of the evidence that one who wanted a shipyard on December 23, 1944, assuming there was no condemnation, would not have given something to be able [295] to move into this going shipyard and be able to use all of its facilities and machinery. Certainly it would be worth something—not zero. If the Government had given its prior consent to the assignment, as must be assumed, the purchaser could certainly expect to at least remain in

possession for the duration of the war and for some time thereafter repairing ships for the Government, with an absolute right to the option to purchase upon the expiration of the lease or sooner termination thereof, unless terminated for failure to cure a default after 30 days notice thereof.

Even if we forget the option, and assume that all that Tavares had was a tenancy at will or at sufferance of the Government, the actual possession of the shipyard as a going concern, making money as counsel for plaintiff stated, had some value.

AUTHORITIES

Sections 657, 659 and 660 California Code of Civil Procedure.

It is respectfully submitted that the trial has resulted in a miscarriage of justice and that a new trial should be granted.

Respectfully submitted,

CHARLES C. CROUCH

JOHN M. MARTIN

FRANK L. MARTIN, JR.

Attorneys for Defendants, Tavares Construction
Company, Inc., and Associates

[Endorsed]: Filed Jun. 6, 1947. Edmund L. Smith,
Clerk. [296]

[Title of District Court and Cause]

AFFIDAVIT OF JOHN M. MARTIN IN SUPPORT
OF MOTION FOR NEW TRIAL

State of California

County of Los Angeles—ss.

John M. Martin, being first duly sworn, deposes and says: That he was present in the above entitled Court on the 27th day of February, 1947, and heard the argument to the jury made by Mr. Landrum, Counsel for the plaintiff in the above entitled action; that in said argument to the jury the said Mr. Landrum made the following statements, which statements have been copied from the official Reporter's Transcript thereof:

"Now, they knew therefore on the 21st day of November 1944, that the Government was going to request priority for the Navy Department, and this Exhibit W says in one of those last paragraphs that it is contemplated they do that." (Tr. pg. 1192.)

* * * * * [297]

"Ladies and gentlemen, you are not going to give them more than they asked for, are you, before this lawsuit was brought? And don't forget that was only their asking price then." (Tr. pg. 1192.)

* * * * *

"Whatever else may be said, Mr. Tavares is a capable business man. He cut himself in to this war-time Garden of Eden without the expenditure of a penny. He built concrete barges for the Government of the United States at a profit, and now he asks you to put your hands into the pockets of the people of the United States and to give him a half a million more." (Tr. pg. 1180.)

* * * * *

“But, my goodness, are you going to permit those people to go into the treasury of the United States, when we come in here in a condemnation case, and get more?” (Tr. pg. 1194.)

“Well, if you think they are entitled to that you give it to them. But if you think that it would be right for me to say to you ‘I want to get some money out of this war business. I want you to spend \$2,700,000 to build me a shipyard to build concrete ships to sell to you at a profit, and then after it is all through and done, I want you to give me \$80,000 for building my own shipyard, and supervising that, and then on top of that I have taken the expense, I have taken the vacations for my own office force.’” (Tr. pg. 1195.)

* * * * *

“What they are actually doing, ladies and gentlemen, is coming into a condemnation case and trying to [298] get damages against the Government of the United States for what they claim is a violation of that contract.” (Tr. pg. 1190.)

* * * * *

“* * * That lease, Mr. Hinds”—and I am talking about the Tavares Construction Company claim now—“That lease, Mr. Hinds, carries within it a paragraph that it cannot be assigned or pledged without the written consent of the Defense Plant Corporation or of the Maritime Commission. Mr. Hinds, would you pay anything for a lease which you couldn’t assign? Would you sign that lease which you couldn’t assign? Would you sign that

lease? "Why, no, Mr. Landrum, I wouldn't sign such a lease."

"I give you that, ladies and gentlemen of the jury, on both claims, that you give to them some money for what they claim was a fee which they were to get for building a shipyard with Government money upon which they could build ships at a profit and sell them to the Government, and then ask you to give them \$500,000 on top of that." (Tr. pg. 1175.)

* * * * *

"All right. Here is the thing that Mr. Hindes said was such that he never would have even signed this lease in the first place." (Tr. pg. 1188.)

* * * * *

"Twenty-four: Lessee will not without prior written consent of Defense Corporation and the approval of the Maritime Commission sell, assign, or pledge this lease or any of its rights or [299] obligations hereunder, or sublease or permit the use by others of any of the property covered by this lease."

"Mr. Willing Buyer, I want to sell you this lease. I want to assign it. I want to sublet a part of it to you. What will you give me?"

"Why, Mr. Tavares, you can't do that without you get the consent of the Defense Plant Corporation and the Maritime Commission. I wouldn't give you five cents for it. How do you know they are going to let you make a profit on this paper? Is it reasonable to suppose after they put up for you \$2,700,000 and build you a shipyard, that they will permit you to go ahead and sell this paper? Do you

not know that on the date of this lease it is indicated that the Navy of the United States proposes to take over those utilities?

"Mr. Tavares told me that he thought that he could get the consent of the Defense Plant Corporation and the Maritime Commission for him to make another half a million dollars." (Tr. pg. 1189.)

* * * * *

"* * * But I say to you that the claim of Tavares Construction Company in this case goes out the window by virtue of evidence which you can see, which you can feel, and which will stand out before you like the tall pines in the forest of truth. Every claim that it has in this lawsuit stems from Exhibit W. I say to you that, in reading that document, if you can tell me what it means, then you are probably a better man than I am. I tell you that, if the lawyers can agree on what that document means, they are better lawyers than I am. [300] So, therefore, their rights stemming from Plancor 407 are what you are to determine." (Tr. pg. 1181.)

"* * * But, if you will go with me through Exhibit W, and then can say that you believe that, on the 23rd day of December, 1944, any man would have bought that instrument, and paid its market value as they have contended for, I will be unable to follow you." (Tr. pg. 1182.)

Affiant further states that by the Court's ruling and admonition as set forth at page 404 of the Transcript to the effect that affiant would not be permitted to talk about the Court of Claims, affiant understood that he was not to question Tavares's expert witnesses as to whether

they assigned as a reason for their opinion as to value the fact that Tavares had a right to sue in the Court of Claims which chose in action had been acquired by this action.

Affiant further understood that counsel for Tavares should not in his argument tell the jury of the existence of such chose in action or that it had been taken from Tavares by this action.

Affiant further states that except for such ruling and admonition by the Court, he would have offered evidence by each of the expert witnesses who testified for Tavares, for the purpose of proving that the value of the right to sue in the Court of Claims was greater than the market value to which they had testified.

Affiant further states that except for such ruling and statement by the Court, affiant would have argued to the jury the facts that gave rise to such right of action in the Court of Claims, the fact that Tavares had been by this action deprived of the Lease and Option Contract upon which such action in the Court of Claims would of necessity be based and would have argued as to the value of said chose in action.

Affiant further states that except for the aforesaid ruling of the Court, affiant would have cross-examined each of the Government's expert witnesses for the purpose of showing that they had not only [301] failed to take into consideration Tavares's right of action in the Court of Claims for breach of the option contract, but that they were actually unaware of the existence of such a right on the part of Tavares and based their opinion upon their erroneous idea that the option had no value merely because it could not be sold. .

Affiant further states that the aforesaid ruling and admonition by the Court took counsel for Tavares by surprise which ordinary prudence could not have guarded against and was extremely prejudicial to a proper consideration of the facts of the case by either the court or the jury.

Affiant further states that the case of National City vs. Tavares, et al., filed for the recovery of rental as alleged in Paragraphs IV, V, VI and VII of the Answer, Counter-Claim and Cross-Claim filed herein by Tavares, et al., is still pending and undetermined in the Superior Court of the State of California in and for San Diego County.

Affiant further states that it is his opinion that the Court in the instant case having first acquired jurisdiction of both the parties and the subject of the action pending in the State Court as aforesaid has exclusive jurisdiction in the premises and should proceed to fully and completely adjudicate the rights of all parties to this action to the end that this action may become res adjudicata of the rights of each and all of the parties hereto. That any Judgment herein rendered should by its terms be made to supersede any Judgment rendered in the aforesaid action by the State Court.

JOHN M. MARTIN

Subscribed and sworn to before me this 21st day of May, 1947.

(Seal)

ANNA M. ROSSER

Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: Filed Jun. 6, 1947. Edmund L. Smith,
Clerk. [302]

[Title of District Court and Cause]

AFFIDAVIT OF FRANK L. MARTIN IN SUPPORT
OF MOTION FOR NEW TRIAL

State of California

County of Los Angeles—ss.

Frank L. Martin, being first duly sworn, says:

That after the Court had instructed the jury in the above cause and the jury had retired to the jury room, but before the jury had returned their verdict, affiant called upon the Court in his chambers, and called the Court's attention to the fact that the Court on the previous day had stated that he had concluded that the date of taking as to all interests other than Tavares was November 10, 1942, but that the Court in his instructions had instructed the jury that as to Parcel "A" that if the jury found that it was originally contemplated that Parcel "A" would be taken as a part of the entire project, that the jury should also use November 10, 1942 as the date of evaluation for Parcel "A", and that this would leave the matter in such condition that the parties would not know what date the jury had used for [303] Parcel "A".

That the Court stated that while he had previously stated that he had determined that the date of taking as to all interests other than Tavares was November 10, 1942, that since a question of fact was involved as to the date of taking of Parcel "A", that he had decided to leave the matter to the jury.

FRANK L. MARTIN

Subscribed and sworn to before me this 21st day of May 1947.

(Seal)

ANNA M. ROSSER

Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: Filed Jun. 6, 1947. Edmund L. Smith,
Clerk. [304]

[Title of District Court and Cause]

ORDER DENYING MOTION FOR A NEW TRIAL

Upon consideration of the entire record, the motion of defendants Tavares Construction Company, Inc., a corporation, Concrete Ship Constructors, a joint venture, Lloyd S. Stroud, R. S. Seabrook, C. M. Elliott, Carlos Tavares, Henry M. Page, Don F. Gates, and Stroud-Seabrook, a copartnership, for a new trial in the above entitled proceeding is denied in toto. Exceptions allowed movants.

Dated July 29, 1947.

PAUL J. McCORMICK

United States District Judge

[Endorsed]: Filed Jul. 29, 1947. Edmund L. Smith,
Clerk. [305]

[Title of District Court and Cause]

NOTICE OF APPEAL

Notice is hereby given that the defendants Tavares Construction Company, Inc., a corporation, Concrete Ship Constructors, a joint venture, Stroud-Seabrook, a copartnership, Lloyd S. Stroud, R. S. Seabrook, C. M. Elliott, Carlos Tavares, Henry M. Page, and Don F. Gates, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from those portions of the judgment entered in this action on June 6, 1947 adjudicating issues between the plaintiff and said defendants but not from any portion thereof adjudicating issues between said defendants and any of the other defendants, and from the order denying the motion of said defendants for a new trial entered in this action July 29, 1947.

Dated this 25th day of August, 1947.

JOHN M. MARTIN and
FRANK L. MARTIN, JR.

By John M. Martin

Attorneys for Defendants Tavares Construction Company, Inc., Concrete Ship Constructors, Stroud-Seabrook, Lloyd S. Stroud, R. S. Seabrook, C. M. Elliott, Carlos Tavares, Henry M. Page, and Don F. Gates

[Endorsed]: Filed & mld. copy to attys. for plf. & remaining defts., Aug. 26, 1947. Edmund L. Smith, Clerk. [306]

In the District Court of the United States for the
Southern District of California

Central Division

No. 248-SD-Civil

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CERTAIN PARCELS OF LAND IN CITY OF NA-
TIONAL CITY, COUNTY OF SAN DIEGO,
STATE OF CALIFORNIA, TAVARES CON-
STRUCTION CO., INC., a Corporation, et al.,

Defendants.

BOND ON APPEAL

Whereas, in an action in the above entitled court, judgment was on June 6th, 1947, entered in said court; and

Whereas, the Defendants, Tavares Construction Co., Inc., a Corporation, Concrete Ship Constructors, a Joint Venture, Stroud-Seabrook, a Co-Partnership, Lloyd S. Stroud, R. S. Seabrook, C. M. Elliott, Carlos Tavares, Henry M. Page and Don F. Gates, are dissatisfied with said Judgment and are desirous of appealing therefrom to the Circuit Court of Appeals for the Ninth Circuit,

Now Therefore, in consideration of the premises and of such appeal, we, the undersigned hereby obligate ourselves to the Plaintiff above named under the statutory obligations (Rule 73(c) Rules of Civil Procedure for the District Courts of the United States) and we do hereby undertake in the sum of Two Hundred Fifty (\$250.00) Dollars and promise on the part of the said Defendants and Appellants, that said Appellants will pay

all costs, if the appeal is dismissed or the judgment is affirmed, or such costs as the [307] Appellate Court may award if the judgment is modified.

Dated: August 25th, 1947.

UNITED STATES FIDELITY AND
GUARANTY COMPANY

By O. D. Brick

Attorney-in-Fact

The Premium on This Bond Is \$10.00 for 1 yr.

State of California

County of Los Angeles—ss:

On this 25th day of August in the year one thousand nine hundred and forty-seven, before me, Elizabeth A. Sheridan, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared O. D. Brick, known to me to be the duly authorized Attorney-in-fact of the United States Fidelity and Guaranty Company, and the same person whose name is subscribed to the within instrument as the Attorney-in-fact of said Company and the said O. D. Brick duly acknowledged to me that he subscribed the name of the United States Fidelity and Guaranty Company thereto as Surety and his own name as Attorney-in-fact.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

ELIZABETH A. SHERIDAN

Notary Public in and for Los Angeles County,
State of California

My Commission Expires Nov. 5, 1948.

Examined and recommended for approval as provided in Rule 8. Frank L. Martin, Jr.

I hereby approve the foregoing bond. Dated this 26 day of Aug., 1947. Edmund L. Smith, Clerk U. S. District Court, Southern District of California; by Edw. F. Drew, Deputy.

[Endorsed]: Filed Aug. 26, 1947. Edmund L. Smith, Clerk. [308]

[Title of District Court and Cause]

ORDER FOR TRANSMISSION OF ORIGINAL EXHIBITS TO APPELLATE COURT; USE OF COURT'S COPY OF TRANSCRIPT AND COURT'S COPY OF PLEADINGS

Pursuant to the Stipulation between the plaintiff, and the defendants Tavares Construction Company, Inc., et al., and good cause appearing therefor, it is hereby ordered, in connection with the preparation by the Clerk of this Court of the record on appeal by the defendants Tavares Construction Company, Inc., et al., notice of which appeal was filed August 26, 1947, as follows:

1. That in accordance with the provisions of Rule 75(i) of the Rules of Civil Procedure all of the original exhibits designated by either party for inclusion in the record on appeal shall be transmitted to the Appellate Court for its inspection, in lieu of copying the same into the record. That all of said original exhibits which are in the possession of the Clerk of this Court shall be transmitted by him to the Clerk of the Appellate Court at the time of the transmission of the rest of the record on

appeal, and shall be returned to the Clerk of this Court after the final determination of said [312] appeal and there is no longer any need therefor by the Appellate Court. That as to the exhibits which were returned to said defendants for safekeeping, that such defendants shall transport the same at such defendants' own expense and deliver the same to the Marshal of the Appellate Court as provided for in Rule 18 of the Rules of the United States Circuit Court of Appeals for the Ninth Circuit, and that such exhibits shall be deemed to be incorporated in the record on appeal.

2. That two copies of the transcript of the evidence and proceedings of the trial and of the motion for new trial need not be filed as required by Rule 75(b) of the Rules of Civil Procedure, but that in lieu thereof the Court's copy of said Transcripts shall be made available to the Clerk for inclusion in the record on appeal in connection with the appeal of said defendants.

3. That such of the extra copies of the pleadings and other proceedings, commonly known as the Court's copies, as are available may be removed by the Clerk from the files in this action or obtained from the Court and used by the Clerk in the preparation of the record on appeal of said defendants in lieu of making copies thereof.

Dated this 3rd day of Sept., 1947.

PAUL J. McCORMICK

Judge of the District Court

Presented by

FRANK L. MARTIN, JR.

Attorney for Defendants

[Endorsed]: Filed Sep. 3, 1947. Edmund L. Smith,
Clerk. [313]

[Title of District Court and Cause]

STIPULATION EXTENDING TIME FOR DESIGNATION AND FILING BY APPELLEE OF ADDITIONAL PORTION OF RECORD, PROCEEDINGS AND EVIDENCE TO BE INCLUDED IN RECORD ON APPEAL; AND ORDER THEREON

It appearing that Tavares Construction Company, Inc., a corporation, and Concrete Ship Constructors, a joint venture, Stroud-Seabrook, a copartnership, L. S. Stroud, R. S. Seabrook, C. M. Elliott, Carlos Tavares, Henry M. Page and Don F. Gates, some of the defendants in the above entitled action, filed their and the first notice of appeal from the judgment in the above entitled action to the United States Circuit Court of Appeals, Ninth Circuit, on August 26, 1947; and that said defendants filed their designation of portions of the record on appeal on the third day of September, 1947; and

It further appearing that plaintiff United States of America requires additional time for the purpose of serving and filing a designation of additional portions of the record, proceedings and evidence to be included in the record on appeal;

Now, Therefore, It Is Hereby Stipulated by and between plaintiff and defendants Tavares Construction Company, Inc., a corporation, Concrete Ship Constructors, a joint venture, Stroud-Seabrook, a copartnership, L. S.

No. 11820

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

TAVARES CONSTRUCTION COMPANY, INC., a
corporation, CONCRETE SHIP CONSTRUCTORS,
a joint venture, STROUD-SEABROOK, a copartner-
ship, LLOYD S. STROUD, R. S. SEABROOK,
C. M. ELLIOTT, CARLOS TAVARES, HENRY
M. PAGE and DON F. GATES,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

TRANSCRIPT OF RECORD

(In Four Volumes)

VOLUME II

(Pages 373 to 740, Inclusive)

Upon Appeal From the District Court of the United States
for the Southern District of California

Southern Division

FILED

MAR 12 1948

PAUL P. O'BRIEN, CLERK

No. 11820

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

TAVARES CONSTRUCTION COMPANY, INC., a
corporation, CONCRETE SHIP CONSTRUCTORS,
a joint venture, STROUD-SEABROOK, a copartner-
ship, LLOYD S. STROUD, R. S. SEABROOK,
C. M. ELLIOTT, CARLOS TAVARES, HENRY
M. PAGE and DON F. GATES,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

TRANSCRIPT OF RECORD

(In Four Volumes)

VOLUME II

(Pages 373 to 740, Inclusive)

Upon Appeal From the District Court of the United States
for the Southern District of California
Southern Division

Stroud, [314] R. S. Seabrook, C. M. Elliott, Carlos Tavares, Henry M. Page and Don F. Gates that plaintiff may serve upon said defendants and file on or before September 29, 1947, plaintiff's designation of portions of the record, proceedings and evidence to be contained and included in the record on appeal of said defendants from the judgment herein.

Dated: This 12th day of September, 1947.

JAMES M. CARTER

United States Attorney

By Francis C. Whelan

Special Assistant to the Attorney General
Attorneys for Plaintiff United States of
America

JOHN M. MARTIN and

FRANK L. MARTIN, JR.

By Frank L. Martin, Jr.

Attorneys for Tavares Construction Com-
pany, Inc., a corporation, Concrete
Ship Constructors, a joint venture,
Stroud-Seabrook, a co-partnership, L.
S. Stroud, R. S. Seabrook, C. M.
Elliott, Carlos Tavares, Henry M.
Page and Don F. Gates, Defendants

ORDER EXTENDING TIME IN WHICH PLAINTIFF MAY SERVE AND FILE DESIGNATION OF ADDITIONAL PORTIONS OF RECORD, PROCEEDINGS AND EVIDENCE TO BE INCLUDED IN THE RECORD ON APPEAL

Good cause appearing therefor; It Is Hereby Ordered that plaintiff United States of America may on or before September 29, 1947, serve upon defendants Tavares Construction Company, Inc., a corporation, Concrete Ship Constructors, a joint venture, Stroud-Seabrook, a co-partnership, L. S. Stroud, R. S. Seabrook, C. M. Elliott, Carlos Tavares, Henry M. Page and Don F. Gates and file plaintiff's designation of additional portions of the record, proceedings and evidence to be included in the record on appeal from the judgment in the above entitled action taken by said defendants, and the time within which plaintiff may serve and file such designation is hereby extended to and including September 29, 1947.

Dated: This 12th day of September, 1947.

PAUL J. McCORMICK

United States District Court Judge

[Endorsed]: Filed Sep. 12, 1947. Edmund L. Smith, Clerk. [315]

[Title of District Court and Cause]

STIPULATION EXTENDING TIME FOR FILING
AND DOCKETING OF RECORD ON APPEAL
IN APPELLATE COURT

It appearing that Tavares Construction Company, Inc., a corporation, Concrete Ship Constructors, a joint venture, Stroud-Seabrook, a copartnership, L. S. Stroud, R. S. Seabrook, C. M. Elliott, Carlos Tavares, Henry M. Page and Don F. Gates, some of the defendants in the above entitled action, filed their and the first notice of appeal from the judgment in the above entitled action to the United States Circuit Court of Appeals, Ninth Circuit, on August 26, 1947; and that said defendants filed their designation of portions of the record on appeal on September 3, 1947; and

It further appearing that pursuant to stipulation of the plaintiff and said defendants that the Court on September 12, 1947, ordered the time, for plaintiff to serve and file its designation of additional portions of the record on appeal extended to and including September 29, 1947; and [319]

It further appearing that the original time allowed by Rule 73(g) of the Federal Rules of Civil Procedure of 40 days from the filing of said notice of appeal on August 26, 1947, for the filing and docketing of said appeal in the appellate court will expire on October 5, 1947, thereby leaving only six days for the Clerk to prepare said record on appeal; and

It further appearing that due to the size of the record and the shortness of time for the preparation thereof by the Clerk, that additional time be provided for the preparation, filing and docketing of said record on appeal;

Now, Therefore, It Is Hereby Stipulated by and between plaintiff and said defendants, through their respective counsel of record, that the time for the filing and docketing of the record on appeal of said defendants may be extended thirty days, to wit, to and including November 4, 1947.

Dated this 15th day of September, 1947.

JAMES M. CARTER

United States Attorney

By Francis C. Whelan

Special Assistant to the Attorney General

Attorneys for Plaintiff United States of
America

JOHN M. MARTIN and

FRANK L. MARTIN, JR.

By Frank L. Martin, Jr.

Attorneys for Tavares Construction Company, Inc., a corporation, Concrete Ship Constructors, a joint venture, Stroud-Seabrook, a co-partnership, L. S. Stroud, R. S. Seabrook, C. M. Elliott, Carlos Tavares, Henry M. Page and Don F. Gates, Defendants [320]

ORDER EXTENDING TIME FOR FILING AND
DOCKETING OF RECORD ON APPEAL IN
APPELLATE COURT

Pursuant to the above and foregoing stipulation of the parties, and good cause appearing therefor;

It Is Hereby Ordered that, pursuant to Rule 73(g) of the Federal Rules of Civil Procedure, the time for defendants Tavares Construction Company, Inc., Concrete Ship Constructors, Stroud-Seabrook, L. S. Stroud, R. S. Seabrook, C. M. Elliott, Carlos Tavares, Henry M. Page and Don F. Gates, for filing the record on appeal and docketing the action in the appellate court, is hereby extended to and including November 4, 1947.

Dated this 16th day of September, 1947.

PAUL J. McCORMICK

United States District Court Judge

[Endorsed]: Filed Sep. 16, 1947. Edmund L. Smith,
Clerk. [321]

[Title of District Court and Cause]

STIPULATION EXTENDING TIME FOR FILING
RECORD AND DOCKETING APPEAL IN AP-
PELLATE COURT AND ORDER THEREON

It appearing that Tavares Construction Company, Inc., a corporation, Concrete Ship Constructors, a joint venture, Stroud-Seabrook, a copartnership, L. S. Stroud, R. S. Seabrook, C. M. Elliott, Carlos Tavares, Henry M. Page and Don F. Gates, some of the defendants in the above entitled action, filed their and the first notice of appeal from the judgment in the above entitled action to the United States Circuit Court of Appeals, Ninth Circuit, on August 26, 1947; and

It further appearing that pursuant to stipulation of the plaintiff and said defendants that the Court on September 16, 1947, ordered that the time for said defendants to file the record on appeal and docket the action in the Appellate Court be extended to and including November 4, 1947; and

It further appearing that John M. Martin, counsel for said defendants, who tried the above entitled action in the above entitled [322] Court is now absent from his office in Los Angeles, and has been continuously absent therefrom since about September 3, 1947, in connection with matters pending in other States and the District of Columbia, and that as a result thereof additional time is required to enable said counsel to prepare a statement

of the points on which he intends to rely on the appeal and to designate the parts of the record to be printed;

Now, Therefore, It Is Hereby Stipulated by and between plaintiff and said defendants, through their respective counsel of record, that the time for the filing and docketing of the record on appeal of said defendants may be extended an additional twenty days, to wit: to and including November 24, 1947.

Dated this 28th day of October, 1947.

JAMES M. CARTER

United States Attorney

By Joseph F. McPherson

Attorneys for Plaintiff United States of
America

JOHN M. MARTIN and

FRANK L. MARTIN, JR.

By Frank L. Martin, Jr.

Attorneys for Defendants Tavares Construction Company, Inc., a corporation, Concrete Ship Constructors, a joint venture, Stroud-Seabrook, a copartnership, L. S. Stroud, R. S. Seabrook, C. M. Elliott, Carlos Tavares, Henry M. Page and Don F. Gates [323]

ORDER EXTENDING TIME FOR FILING AND
DOCKETING OF RECORD ON APPEAL IN
APPELLATE COURT

Pursuant to the above and foregoing stipulation of the parties, and good cause appearing therefor;

It Is Hereby Ordered that, pursuant to Rule 73(g) of the Federal Rules of Civil Procedure, the time for defendants, Tavares Construction Company, Inc., Concrete Ship Constructors, Stroud-Seabrook, L. S. Stroud, R. S. Seabrook, C. M. Elliott, Carlos Tavares, Henry M. Page and Don F. Gates, for filing the record on appeal and docketing the action in the Appellate Court is hereby extended to and including November 24, 1947.

Dated this 28th day of October, 1947.

PAUL J. McCORMICK

United States District Court Judge

[Endorsed]: Filed Oct. 28, 1947. Edmund L. Smith,
Clerk. [324]

[Title of District Court and Cause]

NOTICE OF MOTION TO CORRECT AND
MODIFY RECORD AND JUDGMENT

To James M. Carter and Robert G. Berry, Attorneys for
Plaintiff:

Please take notice that on the 2nd day of December, 1947, at the hour of 10:00 o'clock A. M., or as soon thereafter as counsel can be heard, the attorneys for the defendants, Tavares Construction Company, Inc., a corporation, et al., will appear before His Honor, Judge Paul J. McCormick, in the room usually occupied by him as a court room, in the United States Court House at Los Angeles, California, and move the Court for the entry of an Order herein as follows:

1. Correcting, modifying and enlarging the record in such manner as to eliminate the ambiguity, uncertainty and confusion that now exists by reason of the fact that the provisions of Paragraph 10, at page 13, of the Judgment entered June 6th, 1947 are not in conformity with the views of the trial court as expressed elsewhere in the record. [325]

2. Directing the making of a supplemental record in conformity with the findings and decision of the Court upon this Motion.

3. Modifying the Judgment in such manner as to carry out and give effect to the views and decision of the trial court upon the hearing of this Motion.

The ambiguities and uncertainties which will form the basis of this Motion are set forth in detail in the supporting affidavit of John M. Martin served and filed herewith. The special portions of the record to which

counsel will direct the Court's attention and seek modification and enlargement are referred to and enumerated in said affidavit.

Said Motion will be based upon the record, files, pleadings, orders and supporting affidavit of John M. Martin served herewith.

Dated this 17th day of November, 1947.

JOHN M. MARTIN

FRANK L. MARTIN

Attorneys for Defendants Tavares Construction Company, Inc., a corporation, Concrete Ship Constructors, a joint venture, Stroud-Seabrook, a copartnership, Lloyd S. Stroud, R. S. Seabrook, C. M. Elliott, Carlos Tavares, Henry M. Page, and Don F. Gates

POINTS AND AUTHORITIES

Paragraph 14, page 14, of the Judgment dated June 6, 1947 by which the Court retains jurisdiction hereof for the purpose of making such further orders, judgments and decrees as may be necessary in the premises.

Federal Rules 60, 75(h) and 81(7)

Sec. 473 C. C. P. [326]

Received copy of the within Notice of Motion this 18 day of November, 1947. Joseph F. McPherson, Attorney for Pft.

[Endorsed]: Filed Nov. 18, 1947. Edmund L. Smith, Clerk. [327]

[Title of District Court and Cause]

AFFIDAVIT OF JOHN M. MARTIN IN SUPPORT
OF MOTION TO CORRECT AND MODIFY
RECORD

State of California

County of Los Angeles—ss.

John M. Martin, of lawful age, being first duly sworn,
states:

That as one of the attorneys of record for defendants, Tavares, et al., he was present in court and participated throughout the entire proceedings in the above entitled cause in the trial court. That in order to clarify the record and enable the Appellate Court to have before it everything that occurred that is material to either party, it is necessary that the present record, which only partially discloses what occurred in the District Court, be corrected, modified and enlarged so as to truly disclose all that occurred in the District Court.

That in order to eliminate any ambiguity, uncertainty or confusion as to what the trial court intended by finding at Paragraph 10, [328] page 13, of the Judgment that just compensation for the taking of the rights of these defendants was nothing and especially to eliminate the confusion that exists in the record due to Paragraph 10, page 13, of said Judgment not being in conformity with the views of the trial court as expressed elsewhere in the record, it is necessary for affiant to state the views of Judge Yankwich, who presided at the pretrial hearing

and signed the pretrial order, as set forth in said order dated February 5, 1947, as follows:

“ORDER UPON PRETRIAL

The Court, having considered upon pretrial the matters heretofore submitted on September 30, 1946, calling for the determination of the nature of the interest of Tavares Construction Company, Inc., involved in this proceeding, does now, after consideration of the record and the joint stipulation filed on September 27, 1946, and the additional memorandum filed on October 4, 1946 and the argument of counsel, determine:

(1) That the lease and option rights of Tavares Construction Company, Inc., granted under the ‘Agreement of Lease,’ dated December 27, 1941, and by the supplements thereto, have been taken and condemned by this action.

(2) That the defendant Tavares Construction Company, Inc., has a compensable interest in the property taken by this proceeding.

(3) That the facts are as set forth in the joint stipulation and joint memorandum of counsel above referred to and the Court’s written opinion filed herein on October 10, 1946.

Dated: This 5th day of February, 1947.

LEON R. YANKWICH

United States District Judge” [329]

It clearly appears from the record (Tr. p. 433) that Judge McCormick was of the opinion that defendants’ option rights should be determined by a separate action

in the United States Court of Claims. From statements made to Government counsel and affiant from the bench during the course of the trial, which statements were made in the absence of the jury, affiant is satisfied that at all times during the course of the trial, at the time of the signing of the Judgment, and at the time of denying Defendants' Motion for New Trial, Judge McCormick, as trial judge, believed this court in this proceeding was powerless to determine the question of compensation for cancellation or frustration of option rights of defendants attributable to the action of the agents of the Government. In confirmation of affiant's statement as aforesaid, the record does show (Tr. p. 433) that Judge McCormick stated in substance that the case could be simplified by preserving the option feature for a separate action in the United States Court of Claims. That Judge McCormick was still of the foregoing opinion at the time of the hearing of Defendants' Motion for New Trial is shown by the record (Tr. p. 77, line 19, of proceedings on motion for new trial) where Judge McCormick in substance said that except for Judge Yankwich's pretrial order, he would not have permitted the question of compensation as to these defendants to go to the jury, to decide.

Affiant further states that the views expressed by Judge McCormick as shown by the record (Tr. p. 400, line 20, to p. 405, line 3) where Judge McCormick stated that counsel for these defendants would not be permitted to discuss or talk about said defendants' right to sue in the United States Court of Claims for the recovery of damages for breach of their option contract, show that it was Judge McCormick's view and determination that while the physical property and right, title and interest of said

defendants in and to said property had been taken by this action, that the trial court was without power to adjudicate or determine the amount of compensation [330] due from plaintiff to said defendants by reason of the cancellation or frustration of their option.

Affiant further states that he is satisfied from the statements made by Judge McCormick during the course of the trial, that the trial court concluded that defendants' option rights were of substantial value and that the trial court only intended and understood its judgment herein to mean that inasumch as the trial court was without power to award compensation for frustrated option rights, that it was entering a judgment which only determined the issue of just compensation in so far as the trial court had the legal right to award compensation in this proceeding.

Affiant further states that from the statements of the court as aforesaid, affiant is satisfied that at the time the trial court signed the Judgment and at the time the trial court entered the Order denying Defendants' Motion for New Trial, the trial court entertained the views as herein-above set forth and did not intend to make or sign a judgment that would in any manner preclude these defendants from the maintaining of a separate action in the United States Court of Claims for the recovery of damages for breach of their option contract.

Affiant further states that he is satisfied from statements he heard the trial court make during the course of the trial, that the signing of the judgment herein in so far as it purports to state that just compensation for the taking of said option rights is nothing, was signed by the trial judge with the mind of preserving to the defendant optionees the right to litigate their claim in the United

States Court of Claims and that the court did not intend thereby to modify the views expressed during the trial.

"That in order to eliminate ambiguity, uncertainty and confusion in the record as to what the court intended by the provisions of Paragraph 10, page 13, of the Judgment herein, it is necessary that the record herein be corrected and modified to the end that it [331] may truly and fully disclose what occurred in the District Court and that the Judgment herein be made definite by a finding that the court either has or is without power to award compensation in this proceeding for the taking, cancellation or frustration of defendants' option rights.

Affiant further states that from the facts as stated as aforesaid, affiant is satisfied that the trial court denied Defendants' Motion for New Trial because the trial court believed that said defendants were in the wrong forum and that said court was without power in this proceeding to award to said defendants, compensation for the cancellation or frustration of their option rights. Affiant is satisfied that the trial court believed that said defendants were entitled to equitable and substantial relief but that said relief could only be afforded by the United States Court of Claims.

That affiant did not learn that the record was incomplete and failed to show all that occurred in the District Court until a re-examination of the entire record was made under date of November 13, 1947 for the purpose of preparing the Record on Appeal.

That affiant acted with due diligence though the actual re-examination of the record was delayed for the reason

that affiant was necessarily absent from the State of California while engaged in working on other legal matters for the period of approximately two months.

That by the terms of Paragraph 14, page 14, of the Judgment this court retains jurisdiction hereof for the purpose of making such further orders, judgments and decrees as may be necessary in the premises. That in the interest of clarity, the record herein should either indicate:—

(a) that the trial court determined that it had power to award compensation for the cancellation or frustration of defendants' option contract; or

(b) that the trial court determined that it did not have power [332] to award compensation for the cancellation or frustration of defendants' option contract.

JOHN M. MARTIN

Subscribed and sworn to before me this 17th day of November, 1947.

(Seal)

ANNA M. ROSSER

Notary Public in and for the County of
Los Angeles, State of California [333]

Received copy of the within Affidavit of John M. Martin this 18 day of November, 1947. Joseph F. McPherson, Attorney for Pft.

[Endorsed]: Filed Nov. 18, 1947. Edmund L. Smith, Clerk. [334]

[Minutes: Tuesday, December 2, 1947]

Present: The Honorable Paul J. McCormick, District Judge.

For hearing motion of defendants Tavares Construction Co., Inc., et al., to correct and modify record and judgment; C. U. Landrum, Esq., Spec. Asst. to Att'y General, present for Gov't; John M. Martin and Frank L. Martin, Esqs., present for moving defendants;

Attorney John Martin argues in support of motion and Attorney Landrum argues in reply and in opposition to motion. Court makes a statement and notes correction in transcript of Feb. 20, 1947, (page 435, line 3).

At 11:23 A. M. Attorney John Martin argues further in support of motion in closing. Court makes a statement and reads from transcripts and record.

Court gives oral opinion and enters order that certain words are hereby stricken from judgment upon verdict entered June 7, 1947, in accordance with said opinion.

Attorney Landrum excepts to Court's ruling.

Attorney John Martin moves that transcript be made of these proceedings embodying Court's ruling, to be included in record on appeal, without necessity of preparing written order thereon, and it is so ordered over the objection of Attorney Landrum. [335]

[Title of District Court and Cause]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 324 contain full, true and correct copies of Complaint in Condemnation; Affidavit in Support of Order for Possession Under Second War Powers Act; Order for Possession Under Second War Powers Act; Order Amending Complaint; Amendment to Complaint in Condemnation; Order for Immediate Possession; Declaration of Taking No. 1; Decree on Declaration of Taking No. 1; Demand for Trial by Jury; Amended Declaration of Taking; Decree on Amended Declaration of Taking; Amended and Supplemental Complaint in Condemnation; Motion for More Definite Statement or for Bill of Particulars; Minute Order Entered March 26, 1945; Bill of Particulars; Answer to Amended and Supplemental Complaint in Condemnation and Counter-Claim and Cross-Claim of Defendants Tavares Construction Company, Inc., et al.; Order dated September 24, 1946; Stipulation and Agreed Statement of Facts in Support of Joint Motion of Counsel for Plaintiff and the Defendants, Tavares Construction Company, Inc., et al., Relative to Submission of this Case as to Said Defendants as Upon Pre-Trial; Joint Memorandum of Counsel on Pre-Trial; Ruling on Pre-Trial Hearing as to the Interest of Tavares Construction Company, Inc.; Order Upon Pre-Trial; Verdict; Judgment upon the Verdict; Motion for New

Trial; Affidavits of John M. Martin and Frank L. Martin in Support of Motion for New Trial; Order Denying Motion for a New Trial; Notice of Appeal; Bond on Appeal; Designation of Portions of Record on Appeal etc.; Order for Transmission of Original Exhibits etc.; Stipulation and Order Extending Time for Appellee to File Additional Designation of Record; Plaintiff's Designation of Additional Portions of Record etc.; Two Stipulations and Orders Extending Time for Filing Record and Docketing Appeal; Notice of Motion to Correct and Modify Record and Judgment; Affidavit of John M. Martin in Support of Motion to Correct and Modify Record; Minute Order Entered December 2, 1947, and Defendants' and Appellants' Supplemental Designation of Record on Appeal, which together with Original Plaintiff's Exhibits 1 to 5, inclusive, and Original Defendants' Exhibits F to J, inclusive, and Q to W, inclusive, and original reporter's transcript of proceedings on February 17 to 21, inclusive, 24 to 27, inclusive, 1947, June 6, 1947, and December 2, 1947, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$74.10, which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 17th day of December, A. D. 1947.

(Seal)

EDMUND L. SMITH

Clerk

By Theodore Hocke

Chief Deputy Clerk

[Title of District Court and Cause]

Honorable Paul J. McCormick, Judge Presiding

REPORTER'S TRANSCRIPT OF PROCEEDINGS

San Diego, California, Monday, February 17, 1947

Appearances:

For the Plaintiff: James M. Carter, United States Attorney, by C. U. Landrum, Special Assistant to the Attorney General; and Francis C. Whelan, Special Assistant to the Attorney General; and Robert G. Berrey, Special Attorney, Lands Division.

For Defendants, Tavares Construction Company, Inc., a corporation, Concrete Ship Constructors, a joint venture, Stroud-Seabrook, a copartnership, Lloyd S. Stroud, R. S. Seabrook, C. M. Elliott, Carlos Tavares, Henry M. Page, and Don F. Gates: John M. Martin, Esq., Charles C. Crouch, Esq., and Frank L. Martin, Jr., Esq.

For the Defendant, City of National City: C. M. Monroe, Esq., Edwin M. Campbell, Esq., Jean Daze Ratelle, Esq., and Merideth L. Campbell, Esq.

For the Defendants, Carl Johnson and Pearl Johnson; Hunter M. Muir, Esq.

For the County of San Diego: Duane J. Carnes, Esq., Deputy District Attorney.

For the Defendant, San Francisco Bridge Company: Harrison G. Sloane, Esq.

For the Defendant, State of California: L. G. Campbell, Deputy Attorney General; and J. F. Hassler, Deputy Attorney General.

San Diego, California, Monday, February 17, 1947.

10:00 A. M.

The Clerk: Case 248-Civil, United States v. Land, etc.

The Court: Note Your appearances, gentlemen.

Mr. Ratelle: My name is Jean Ratelle. I am appearing on behalf of National City and will be associated with Meredith Campbell and Edwin Campbell and Cyrus Monroe.

The Court: Gentlemen, if you will call your names and speak loud enough so that the reporter can hear you.

Mr. Edwin Campbell: Edwin Campbell for National City.

Mr. Muir: Hunter M. Muir appearing for Carl A. Johnson and Pearl Johnson, defendants.

Mr. Edwin Campbell: I will introduce Mr. Monroe. He will be associated with us representing National City as chief counsel.

Mr. John M. Martin: John M. Martin speaking. Mr. Charles C. Crouch, Frank L. Martin and I appear for the Concrete Ship Constructors and the respective individuals named as co-defendants interested as joint ventures.

The Court: And appearing specially for Tavares Construction Company?

Mr. John M. Martin: Yes. Tavares Construction Company is also one of the joint ventures, and I am trying to include them without mentioning specifically all of the parties.

The Court: Yes. [3*]

Mr. Carnes: Duane J. Carnes appearing for the County of San Diego.

Mr. Sloane: Harrison G. Sloane appearing for San Francisco Bridge Company.

The Court: Any further appearances for any defendants?

Mr. Ratelle: I have noted my name for the record, your Honor; Jean Ratelle for National City.

Mr. Campbell: L. G. Campbell and Mr. J. F. Hassler for the State of California.

The Court: Gentlemen, I will have to ask you again to speak louder so that the reporter can hear you.

Mr. Campbell: L. G. Campbell and J. F. Hassler for the State of California.

The Clerk: And Mr. Monroe, what are the initials, please?

Mr. Monroe: C. M.

The Court: Mr. Campbell and Mr. Hassler are assistant attorneys general?

Mr. L. G. Campbell: Deputies, sir, yes, sir.

The Court: And is the District Attorney of the County of San Diego represented?

Mr. Carnes: Yes, Carnes, deputy district attorney.

The Court: Are there any other defendants appearing in the case?

(No response.) [4]

The Court: Proceed. Where are the government counsel?

Mr. Berrey: Mr. Landrum is on the telephone. He will be here in a few moments, your Honor.

The Court: The case was called for 10:00 o'clock.

Mr. C. M. Monroe: Might I make an inquiry, your Honor?

The Court: Be seated, please, gentlemen, in the bar.

Mr. C. M. Monroe: Something was said to the effect that before we started the actual introduction of evidence there would be discussed some of the questions that will have to be determined ultimately. Was that in accordance with your Honor's understanding?

The Court: The record now shows that government counsel are now in court, Mr. Landrum and Mr. Whelan appearing.

That is correct, Mr. Monroe. I think we had better empanel the jury and then excuse them.

Mr. Monroe: That will be satisfactory, your Honor.

The Court: So as to save the citizens their time.

Mr. Monroe: Yes.

Mr. Martin: May I ask, your Honor please, whether it is intended to excuse the jury for the rest of the day?

The Court: I think so. I think we will excuse them until tomorrow morning.

Mr. John M. Martin: I ask that so that I may instruct my witnesses when they are to be here.

The Court: Yes, I think it will take us the rest of the [5] day with our discussions.

Mr. Crouch, I will have to ask you to leave that position for the government for the time being and to sit over on this side. You, gentlemen, were to be here at 10:00 o'clock and not five minutes after. Call the jurors.

(A jury was duly empaneled and sworn.) [6]

The Court: Ladies and gentlemen, we will take a recess in this case, so far as you are concerned, until tomorrow morning. Gentlemen, I am going to convene at 9:30 instead of 10:00 during the trial of this case. During this recess, ladies and gentlemen, and whenever you separate from one another in the jury box during the trial, you will remember these terms of the admonition

which will now be given by the court. Keep these terms inviolate and, if there be any effort on the part of any person to cause you to commit a violation of the terms of this admonition, you will find out who that person is, without carrying on any conversation or having any contact with him or her, and report his or her identity to the court, and not have any contact or further association with that person, if there be any. During such time do not talk about the case, nor permit any person to speak to you or in your presence concerning the case, and do not form or express any opinion concerning this case until it is finally submitted to you. Be here in the morning at 9:30, ladies and gentlemen, and you may be excused until that time. All other jurors will be excused until they are notified when to appear. I will ask the other jurors, if there are any, to leave the court room during this discussion.

I believe there is one motion here with respect to one of the defendants.

Mr. Berrey: Our motion, your Honor, is with respect to [7] the answer of Carl and Pearl Johnson, defendants, who are the owners of Parcel 9. We move to strike from the answer paragraphs 3, 4, 5, 6, 7, 9, and a portion of the prayer.

Paragraph 3 of the answer alleges that, during the months of April and May of 1942, the defendants had leased a portion of the real property, Parcel 9, to one Carl G. Bliss, at a rental of \$100 per month, and so forth. It is further alleged that the lease was rescinded at the request of Tavares Construction Company.

Paragraph 4 alleges a lease that was in effect at the time of the institution of this action.

Paragraph 5 also alleges a lease that was in effect at the time of the institution of this action.

Paragraph 6 alleges the loss that would be payable to the defendants under the two leases which were in effect at the time of the institution of this action.

Paragraph 7 alleges that the defendants were deprived of these rentals by reason of the institution of this action and the order of possession that was made.

In paragraph 8 the defendants allege that the sum of \$8,000 is the reasonable sum to be allowed defendants as compensation for the fee to their real property herein being acquired by plaintiff.

Paragraph 9 alleges that the sum of \$4,125 is a reasonable sum to be allowed defendants by reason of the loss of [8] the rentals.

The portion of the prayer which is included in our motion, that part included in line 5, is the words "together with lawful interest, from November 10, 1942, and together with the sum of \$4,125 for the loss of rentals under the leases hereinabove described and alleged." It is our contention that the defendants are entitled to only just compensation, which is the fair market value of their interest on the date of taking, which they have alleged to be \$8,000; that they are entitled to that and no more. They are attempting, by paragraph 9, to recover for the loss of rents which they would have received if they had retained the fee title to their property. That is not compensable.

Our ground for moving to strike the paragraph setting up the various leases is that they are evidentiary in nature and, therefore, that they are irrelevant and redundant and are subject to being stricken from the answer.

That is all, your Honor. We have cited in our points and authorities general citations to the effect that irrelevant and redundant matter may be stricken. We have

cited the fact that just compensation is the fair market value of the property at the time of taking. And as to the part with reference to the prayer for interest, the defendant is entitled to interest only from the date that the government acquired possession to the time it filed its declaration and deposited [9] the money, and is only entitled to interest subsequent to the filing of the declaration of taking on any excess over the amount deposited in the registry of the court; that it is not entitled to interest from the original date the government went into possession until the payment of the judgment. [10]

The Court: Mr. Muir.

Mr. Muir: I believe that correctly states the law in respect to the leases that were pleaded. I think, though, in regard to the matter of interest they desire to strike out entirely the value plus lawful interest. I believe it should be that we are entitled to the value plus interest on the amount in excess of the amount declared and deposited in court by the government at the time of their taking. I think that the prayer for the value plus lawful interest should stand.

The Court: You mean the value of the fee?

Mr. Muir: The value of the fee, yes, your Honor.

The Court: These allegations of leasehold interest or of the value of the use it seems to me would be merged in the value of the fee at the time of the taking,—

Mr. Muir: Yes, sir.

The Court: —and it would not be proper to plead them. That would be proper evidence to show the value of the fee probably.

I think you are correct that with the exception of the inclusion of the prayer for interest as to the difference between the amount deposited and the value of the use,

that that portion of the prayer should be stricken. I don't know as it makes any difference because the law is clear as to the measure of just compensation in cases of this kind, but I think the allegation of these leasehold interests in the [11] pleadings is irrelevant and redundant and should go out. The motion will be granted to that extent and denied as to the extent in toto with respect to interest.

The court will take a recess, gentlemen, for just a few minutes.

(A short recess was taken.) [12]

The Court: I thought, gentlemen, there were some matters which should be perhaps a little more thoroughly discussed and considered, before we proceed with the introduction of evidence, as to some of the interests that are involved in the case, not as to all. As to some, it is just a simple problem of ascertaining the just compensation on the basis of the fair market value. There are some features with respect to the Tavares interests and the interests of National City—

Mr. Crouch: I am sorry, your Honor; there is so much noise I can't hear you.

The Court: That is the reason I have raised my voice. We have had considerable difficulty here for a long time and I will ask you gentlemen to raise your voices.

Mr. John L. Martin: Is there any objection to my sitting in the jury box a while, your Honor, while your Honor is talking?

The Court: No, not at all. I hope none of you are so diffident that you will not announce what you have to say to the court. Some of you seem to have that fault. We have constant interruptions because of the activities

in the air here, a situation we have had here for the last 10 years.

I have indicated to you generally what is in the court's mind, without stating it with particularity. There is, of course, the question suggested by the government as to whether the so-called unit rule is the rule that should be [13] adopted or whether there should be some variation from that rule on account of the interests that are alleged by the Tavares Construction Company with respect to these agreements, and the amendments, declarations of taking and amended declarations of taking.

I presume that you are agreeable on the time.

Mr. Landrum: Does your Honor mean that we are agreeable on the question of the date of taking and the date of the valuation?

The Court: Yes.

Mr. Landrum: I would like to discuss with your Honor that point when we come to it, and I think we may arrive at some agreement here by which we can save a lot of time in the trial of this case. And, if your Honor will permit me to discuss it with you for just a moment, I would like to tell you what the case really is, and possibly these gentlemen and I may be able to agree on it.

The Court: I was under the impression that you would be able to agree on it.

Mr. Landrum: Would your Honor hear me? [14]

Mr. Landrum: If the court please, I think we are all agreed on the proposition that the date of valuation is the date of the first disturbance of the ownership or the use of this property by the United States, providing there has been no declaration of taking filed or no order of possession.

Now, in this case, as I understand it, on the 10th day of November, 1942 the petition in condemnation was filed and an order was made by this court giving the government of the United States possession of all of those parcels with which we are here concerned numbered 1 to 11, inclusive. Parcel A was not at this time in this condemnation proceeding. On the 23rd day of December, 1944 the amended petition in condemnation, together with an amended declaration of taking, was filed. In so far as the Tavares Construction Company's claim here is concerned, we have agreed that the date of December 23, 1944 is the date of the taking of their so-called lease, coupled with an option.

Mr. John M. Martin: That may be so stipulated, your Honor, on behalf of my client.

Mr. Landrum: I desire also at this time to say, your Honor, that since my arrival here and my study of this matter, I have found there have been three settlements made.

Parcel 4 is no longer in this case, as to the Santa Fe Railway, except in so far as it may be covered by the Tavares Construction Company's claim. In other words, the [15] land owner in parcel 4, I believe, was the Santa Fe Railway Company. That has been settled; the fee owner is out. Parcel 10, which I also believe was owned by the Santa Fe Railway Company, has been settled and is out. Also parcel 11. Those are out.

Now, the government is perfectly willing to concede at any time and in any case that the moment that we disturb the possession of a landowner, that is the date of the valuation of his property, but he is not entitled to claim any improvements or anything which the government may have made on that property after the date of the dis-

turbance, even though we did not file a declaration until several days ago. That is decided in the Miller case in 317 U. S. I am sure your Honor is familiar with that. So if they will concede with me that the date of valuation of their interest is the first date that the government came in and attempted in any way to interfere with them, or if the government had not touched the land, what is the date of the order in this court for possession of the land. That would be it. If there is neither any disturbance nor possession, nor any order of possession, then when was your declaration of taking filed? It is that date.

Now, if your Honor please, as we understand the situation, and if I may say to the court I am probably under a little handicap here, and I trust if your Honor notices any [16] transgression of mine in connection with some of your Honor's rules, I want you to know that I will attempt to comply with them.

I have prepared this in the form of a memorandum and when I am through, I would like to present it to your Honor.

The Court: I have received from all of you a pre-trial memorandum. I assumed you were all familiar with the rules of court with respect to a pre-trial memorandum, and I have received your pre-trial memorandum. I assumed it was served on other counsel.

Mr. Landrum: It was, your Honor, but I have gone a little farther here to this extent, going back to the question of when did the government first interfere.

I find on December 19, 1941 with respect to parcel 1 a small hole was dug with a drag line on this property. I am going to hand this to your Honor later, if you will permit me.

As to parcel 2, that is owned by the City of National City. Actual possession was taken in September 7, 1942, but there was no physical disturbance on parcel 2.

On parcel 3 actual possession was taken on September 7, 1942, but there was no actual disturbance with that possession.

Parcel 7—I don't know whether I gave that to you—that is the same situation. On September 7, 1942, under an order of the commanding officer, or whoever it was down at [17] Tavares Construction Company, possession was taken of parcel 7, but they did not disturb it.

Now, as to parcel 9, that is the Johnson people, Carl and Pearl Johnson, on June 5, 1942 actual possession was taken.

As to parcel A, which is owned by the City of National City, and which was brought into this law suit on the 23rd day of December, 1944 by virtue of a declaration of taking, the truth of the matter, according to our records, your Honor, is that on April 1, 1942 the Tavares Construction Company, under and by virtue of its arrangements, went on that property and began extensive dredging operations.

So from that standpoint on parcel 5, 6 and 8, all owned by the City of National City, there was no disturbance and no possession, nothing of any kind until December 1, 1942. That is later than November 10, 1942, which is the date of the order of this court giving the government possession.

Now, as to parcels 1, 2, 3, 7 and 9, the valuation date should be on the basis of actual disturbance and should be earlier than November 10th. But as to parcels 5, 6 and 8, when it comes to the question of the government

or Tavares actually disturbing these people, it was not done until after November 10th.

So the ownership of four parcels here of the City of National City having been disturbed and interfered with prior to November 10, 1942 and three parcels owned by the City of [18] National City not having been, the government respectfully tenders to the City of National City, in order to avoid confusion in the trial of this law suit, a stipulation to the effect that November 10, 1942 be fixed as the date of the valuation of the fee title of those parcels of the City of National City, and we make the same offer to Carl and Pearl Johnson.

Now, if we do not do that, your Honor, we are going to have a great deal of confusion in the trial of this case. It is true that, as a strict matter of law and I frankly concede it, the defendants are entitled to have the date of valuation fixed as the date we disturbed it, when you have five, six or seven dates with nine or ten parcels of land, and we undertake to ask a witness, "What is your opinion on June 5th? What is your opinion on September 7th? What is your opinion on April 1st?" It will be confusing, and for the purposes of clarity the government tenders that stipulation to the City of National City. They will be hurt slightly on four parcels, and helped slightly in three parcels.

Now, with relation to parcel A, parcel A was only brought into this law suit by virtue of the amended declaration of taking, which was filed on the 23rd day of December, 1944. It, therefore, is in a different situation from the other parcels. From our records, there was actually extensive dredging started on parcel A on the first day of April, 1942, [19] and regardless of the fact that it wasn't even in the law suit then, we tender a

stipulation to the City of National City that as to parcel A it may be April 1, 1942. I want it definitely understood, however, that the government does not concede that by making such a stipulation they would be entitled to claim the benefit of hundreds of thousands of dollars of improvements which were placed on there after that time. Now, if your Honor please, if your Honor does not wish this—

The Court: Have you served it on counsel?

Mr. Landrum: I will be very glad to give the other gentlemen copies of it.

The Court: Have you seen this?

Mr. John M. Martin: No. I assume it is offered as a tender of stipulation solely as to the landowners.

Mr. Landrum: It does not affect your argument.

Mr. John M. Martin: And it is understood we have stipulated as to the 23rd of September, 1944 as to the clients I represent.

Mr. Landrum: That is correct.

Mr. John M. Martin: So I am not primarily concerned with this.

Mr. Monroe: May I be heard, your Honor?

The Court: Certainly.

Mr. Monroe: Now, if your Honor please, I do not believe [20] that it is quite as simple as counsel has suggested. To start with, this land, as far as the land of National City is concerned, is tideland. It is land that is set apart originally under the Constitution of California as being public lands dedicated to the uses of the people of the State for commercial navigation and fishery and by the constitutional provisions the alienation of that land is forbidden; that is, the alienation to private parties.

In 1923 by special statute the State conveyed the property to National City. I think we should have before us that statute. It is in the Acts of 1923, at page 81, chapter 46 of that Act, and it provides:

“There is hereby granted and conveyed to the City of National City, in the county of San Diego, State of California, all of the lands situate on the city of National City side of said bay, lying and being between the line of mean high tide and the pier head line in said bay, as the same has been or may hereafter be established by the federal government, and between the prolongation into the bay of San Diego, to the pier head line of the boundary line between the city of National City and the city of San Diego, and the prolongation into the bay of San Diego to the pier head line of the northerly line of the street commonly known as Thirtieth [21] street, same being the southerly boundary of the city of National City, California.” [22]

“Sec. 2. The city of National City shall have and there is hereby granted to it the right to make upon said premises all improvements, betterments and structures of every kind and character, proper, needful and useful for the development of commerce, navigation and fishing, including the construction of all wharves, docks, piers, slips, and construction of and operation of a municipal belt line railroad in connection with said dock system.

“Sec. 3. No grant, conveyance or transfer of any character shall ever be made by the city of National City of the lands described in Section One, or of any part thereof, but the said city shall continue to hold

said lands and the whole thereof unless the same revert or be receded to the state of California. The harbor of National City shall remain always a public harbor and the said city shall never charge or permit to be charged on any of the premises by this act conveyed any unreasonable rate or toll, nor make nor suffer to be made any unreasonable charge, burden or discrimination. In the event of a violation of any of the provisions of this act, the said lands and the whole thereof shall revert to the state of California."

Then, by sections 4 and 5, there is given to National City the right to lease these lands for the purposes enumerated and to collect the rentals. It provides for a term not to exceed 25 years of any lease. However, in about 1925, [23] the act was amended, increasing that term, in sections 4 and 5, to the term of 50 years.

Section 6 provides: "The state hereby reserves unto itself at all times the reasonable use of and access to all wharves, docks, piers, slips and quays hereafter constructed under the provisions of this act, for any vessel or water craft owned, leased or operated by the state."

In addition, as to the meaning of that type of conveyance, I do not know whether there will be any serious contention about it but in the case of *City of Long Beach v. Marshall*, decided by the Supreme Court of California in July, 1938, and reported in 11 Cal. (2d) at page 609, they have held, as to the tidelands under the act conveying to Long Beach, which is, for our purposes, at least practically identical, that what the City of Long Beach has is a fee, and that the reservations of title which are made, similar reservations, are not inconsistent with that fee. but there is, on behalf of the government, added onto the

fee or carved out of the fee, if you please, a right of reservation in certain instances.

That, of course, is important in that it is our contention that what the city of National City is entitled to receive is compensation for the fee less only such right as the State of California may have, or the value of such right.

But I think it goes quite a bit farther with regard to [24] the time of taking, the time when title vests, and the time when the value of this property shall be fixed.

There is, if your Honor please, involved here a most unusual state of facts, not at all what we have in the ordinary condemnation suit. Ordinarily, we come in and it is a question of the property that is taken and what is the property worth but here we have tidelands which are themselves public property, vested with a rather high type of public use, that have been taken both from the city and from the state. Of course, no argument is needed for the proposition that the tidelands of the city, those lands which constitute the waterfront and which serve as its access to the bay, do, necessarily, have a highly public character.

To get back to this particular action, the action was started in November, 1942, and the city of National City and the State and the Tavares Construction Company and the Concrete Ship, and so forth, as I understand it, were made parties to the action. There was no declaration of taking and there was no deposit of money at that time. The declaration of taking wasn't made until two years later.

At the time there was filed, on behalf of the government, an affidavit in support of the order for possession under the Second War Powers Act.

Do you want me to proceed or do you want to wait until after lunch? [25]

The Court: Probably it would be better to suspend at this time. I think we had better meet at 1:30 today.

Mr. Monroe: That is all right; that is very agreeable.

(Thereupon, at 12:00 o'clock noon, a recess was taken to 1:30 o'clock p. m., of the same date.) [26]

San Diego, California, Monday, February 17, 1947.

1:50 P. M.

The Court: Mr. Monroe, I think you may proceed with your argument.

Mr. Carnes: Your Honor, there is a stipulation which has been arrived at, which satisfies the claim of the County. Mr. Muir, and the government, and I agreed to stipulate that the County tax demands against parcel 9 in the sum of \$45.99 are a proper demand and may be paid from the award.

The Court: Is that correct, gentlemen?

Mr. Berrey: That is correct, your Honor.

Mr. Muir: I hesitate to state about deducting it from the award, as a part of the stipulation.

The Court: Yes, perhaps that is for the court later. I think the matter of the apportionment of the award is a matter for the jury.

Mr. Muir: We will stipulate to the amount of the lien, your Honor.

The Court: It is so understood. Then as to that parcel the County of San Diego is not required to appear before the jury, I take it?

Mr. Carnes: That is the only matter we have, your Honor.

Mr. L. G. Campbell: With the permission of the court and counsel, I would like to speak just a few moments about [27] the position of the State of California in the case.

The Act that counsel has referred to was passed in 1925, and by it there was the grant to the City of National City. Under the holding that counsel referred to, *Long Beach v. Marshall*, the fee title passes to the grantee. We have no quarrel with that law of the State of California. In the Act that counsel referred to, in 1923, there was reserved the right in the State to use the piers, water, quays and equipment about the tidelands there. There was that reservation for use by the State.

At the time the answer was prepared setting that up, it was my belief, and I dictated the answer, that there were several craft, several ships, that the State used in training, and so on. As it turns out, and as I am reliably informed by the Department, there is but one ship, and that perhaps would be useful only in training while at anchor. I make this statement to lead up to the expression that we have no evidence to offer, and that we do think if the court enters a nominal judgment of \$1.00 in favor of the State, that it is all that we can reasonably ask the court to enter. [28]

Now, there is something else. The case has many angles and I know Mr. Hassler, of our office, has studied the matter of the dealings involved, as set forth in the pleadings and statements, and I would like if your Honor would hear Mr. Hassler on that particular feature briefly. And then, if I may, or if we may both be excused from court, we will perhaps return this afternoon.

But I wanted to make it clear to the court that we are not taking up the time of the court in claims for damages under the reservation of the 1925 act, or 1923 act—

The Court: The 1925 act, the one that Mr. Monroe referred to this morning.

Mr. Monroe: Yes, sir.

The Court: Is the court to understand that the conceded compensation of \$1.00 for the State's interest will dispose of all of the issues as to the State of California?

Mr. L. G. Campbell: I would say in that connection that I had the engineers of the State make a plat and, according to their plat, the area covered pursuant to the act of the State Legislature to National City is extensive enough to include all of the lands, all of the tidelands, that the federal government now is seeking to condemn.

The Court: Of course, we are glad to hear from Mr. Hassler. But what further light would he throw on the State's position? [29]

Mr. L. G. Campbell: On that particular point, Mr. Hassler will throw no light, as I understand him, but on the matter of the option involved we felt that perhaps the precedent that might be established is one that should be brought to the attention of the court, and it is with that in view that I am suggesting that Mr. Hassler be heard, because he has studied the point.

The Court: Probably we had better hear from Mr. Hassler, then.

Mr. Monroe: That is agreeable.

The Court: Very well, Mr. Hassler.

Mr. Hassler: May it please the court, Mr. Campbell has stated the only compensable interest of the State is very nominal, and we will stipulate, I believe, to a judgment on that basis.

There appears, however, another question which affects the State policywise, on which we would like to be heard, and we don't see how a question like this can be raised at all if it can't be raised as a friend of the court or as I am trying to do it now. The Tavares Company, according to the document included in the memorandum submitted by the attorney for the plaintiff, entered into a contract in December of 1941, and that contract provided, in Section 15, paragraph 15, upon the expiration of the contract for any of certain assigned reasons or causes the Tavares Company would have an [30] option within a certain time to purchase, among other things, the site upon which the present or the subsequent activity was located. As I understand the facts, no condemnation had been filed at that time. This was in December, 1941. On November 10, 1942, a condemnation action was filed and, on November 11th, the day following, an agreement was entered into providing, in effect, that, when title is acquired, the Tavares Company, as the lessee, shall have the right to purchase, and we think it further amplifies the way in which payments shall be made. The original agreement did not state how payment for the site shall be made. It was a method of payment for the machinery and facilities.

As I look at this agreement, it seems to me it is a preconceived notion to take the property of the State and, before any taking is really had, to give it or the court to give it or to covenant to give it to a private party. And I would like to read the applicable provision of the constitution, which is this: "Article 15. Section 3. All tidelands within two miles of any incorporated city or town in this State and fronting on the waters of any harbor, estuary, bay or inlet, used for the purpose of

navigation, shall be withheld from grant or sale to private persons, partnerships or corporations.”

Your Honor, we take the position that neither the federal government nor any instrumentality, the Defense Plant Corpora- [31] tion or anybody else, can take away waterfront property. And, as I say, the State in this particular instance has a very small residual interest; that it cannot take waterfront which the people of the State cannot pass to private ownership and covenant to sell it to somebody before it is even acquired.

We have no quarrel whatsoever with the position that the government can acquire a site, feeling that it will build a building on it, and then changing its mind and then selling the property to a private individual. But it is going back beyond that and doing that which we say cannot be done. It is taking public property for private use, and public property which is definitely set apart and reserved by the constitution. We feel it would be very bad if the federal government would get the idea this can be done and the only reason we bring up our point now is that no consolation or direction can be gained from what has been done in this case. Of course, if my argument is valid, I suppose this goes to the jurisdiction of the taking. All I can suggest, if the court would like to have a brief filed on that particular point, we will be glad to submit one, as a friend of the court, our interest being all taken care of.

The Court: Wasn't there a provision in that Act of 1925 similar to that referred to in the Long Beach case, referred to in the Banning case earlier at Wilmington, that there should be no vesting in any private interest of the tideland? [32]

Mr. Monroe: Yes; I think so.

Mr. Hassler: The difficulty is this and the reason I say we have to raise this point at this time is that neither our constitution nor any statutory law that I am familiar with prohibits the Tavares people, if they can take it properly from the government, from doing so. The constitution says there shall be no grant or sale but doesn't say, as in the alien Japanese land cases, that the person himself is disqualified. So, if we can't suppress the activity at this stage, we can't do it at all unless we enact legislation which would impair the obligations of these contracts.

The Court: There is a very interesting question there but I think probably at this time it becomes necessary to hear from you later on. If so, I will give the State an opportunity to be heard.

Mr. Hassler: Your Honor, as I understand it now, do you want a brief at this time?

The Court: Not now. You might prepare a brief and later on I will give you time, if you desire, to present it. I don't know that it will be necessary to consider that question, inasmuch as the State is now out of the picture as far as compensable interest is concerned. [33]

Mr. John M. Martin: If the court please, if counsel is to prepare a brief, may I suggest for his consideration and the court's that, as I see it, the position of the State and what it is now worrying about is no longer here involved because of the taking by the government of the lease and contract rights and option from the Tavares Company. We are not any longer confronted with such a situation as Mr. Hassler is apparently concerned with.

The Court: The court has indicated what it desires to indicate at this time.

Mr. Hassler: Thank you, your Honor.

Mr. John M. Martin: Thank you, your Honor.

Mr. L. G. Campbell: If the court please, may we then be excused from further attendance?

The Court: Yes, you may both be excused from further attendance. If we desire to call you here, we shall notify you.

Mr. Monroe: Shall I proceed, your Honor?

The Court: Proceed.

Mr. Monroe: If your Honor please, what has just transpired I think is of considerable importance to what we were about to discuss at the noon adjournment, and I mean from the standpoint of when shall this valuation—when shall this land be valued?

I was about to call attention to the affidavit in support [34] of the order for possession, which was filed on November 10, 1942, and which is a part of the files of this case. After describing the property, it is stated in the affidavit:

“That the possession of the said real property which is herein prayed is requested for the use of Tavares Construction Company, Inc. in furtherance of shipbuilding construction and activities of said Tavares Construction Company, Inc. and the United States Maritime Commission; that immediate possession of the real property designated as Parcels 1, 2, 3, 6, 7, 8, 9, 10 and 11, which said parcels are occupied by the said Tavares Construction Company, Inc., either by lease from the City of National City or other persons, or by the permission and consent of the owners or lessees thereof, is necessary and imperative: that the use to be made by plaintiff and the said Tavares Construction Company, Inc. of Parcels 4 and 5 will require the removal and reloca-

tion of the railroad tracks hereinbefore referred to, and plaintiff prays for an order of this Court for the possession of the said Parcels 4 and 5 upon the expiration of thirty (30) days from the making of an order by this Court for the possession thereof." [35]

An order for the possession was accordingly entered. That was on November 10th. As counsel has called to your Honor's attention, on the following day, on November 11th, a contract was entered into or an amendment to the contract with the Tavares Construction Company, by which there was granted to the Tavares Construction Company the option to purchase, which is one of the things that that company now seeks to be compensated for.

As I have stated, there was no declaration of taking at that time, nor did the government deposit its money for the property. As I understand the provisions of the statute, the title passes when the government deposits its money, and there is a declaration of taking filed.

The Court: May I interrupt you there a moment to give you the mind of the court on that?

Mr. Monroe: Yes.

The Court: I think there has been some little modification of that principle under the Second War Powers Act. I believe that it provides the government may pledge its credit.

Mr. Monroe: That is correct; it may. Under that Act, as I understand it, it may follow the procedure and ask for immediate possession without putting up the money. The point that I make, however, is this, your

Honor, that up until 1944, two years later, the government could have [36] dismissed the suit at any time.

Now, as a matter of fact in 1944 there was a motion on the part of National City to dismiss the suit, and the suit was dismissed as to National City. That dismissal, however, later was set aside.

The Court: That was the dismissal entered by Judge Ling?

Mr. Monroe: That is correct. I have here a reporter's transcript of the proceedings, and this I think becomes of tremendous importance in trying to figure out when we should consider the taking for the purpose of valuation. At the time of the discussion before the court of the motion to dismiss, there was presented and read into the record a letter from the chief counsel of the Maritime Commission to the local United States District Attorney, and it says this:

"The United States Maritime Commission has informally advised the Department that it is no longer interested in the land except to the extent that it retains possession a sufficient length of time to remove any facilities it has on the land. The Navy Department, however, is considering taking over the project, but, if it does decide to do so, will not be in a position to complete the administrative matters connected with the acquisition so as to have a declaration of taking available until sometime immediately after October 1, 1944." [37]

Now, what has followed is this: On October 3rd the declaration of taking was filed. There was then filed, or shortly after that, an amended complaint. But I find nothing in the complaint to indicate any explanation of what was going on, except that it refers to the fact that

a declaration of taking has been filed and that the government has now deposited in the registry of the court what it considered as just compensation. But this much at that point becomes plain. Somewhere along the line the original purpose of the taking or the original purpose for which the condemnation action was brought was abandoned, and some place along the line the government decided that they need this piece of land, not for the purpose of permitting Mr. Tavares and his company and associates to build concrete ships on it, but for the purpose of establishing a navy yard.

Now, it seems to me that we are confronted much by the same proposition as we are ordinarily confronted with when there has been a complaint filed and a cause of action set up, and later there is an amended complaint setting up a new and different cause of action, at which time you decide that the commencement of the new cause of action thus set up is from the time of the amendment of the complaint.

Now, frankly, I have not been able to find any decisions squarely in point. I do not find any cases in which the government started out to condemn a piece of property for [38] one public purpose, and then later changed its mind and in the same action decided to carry out the same condemnation for another and different public purpose. I think that perhaps the fact that there has been involved here a different public purpose will go far to answer the suggestion that has just been made on behalf of the State of California, and that is this, that as originally outlined or as originally indicated by the affidavit filed by the government, the taking or the proposed taking when this action was commenced in 1942 was for the purpose of having the property available so that they could sell it to Tavares as a part of their agreement with him.

The City of National City, just like the State of California, questions, and seriously, the right to take property which has already been devoted to a public use for that purpose. When, however, later they decide to put Tavares and his associates out, to take over whatever interests they have and to take the property for a navy yard, why, then obviously we are confronted by a different proposition, and in view of what has happened since, in view of what the property is being used for, I would not feel much like arguing that that was not a use for which the property could not be condemned, because, after all, the establishment of a navy yard is an entirely different thing than the use of the property to grant an option to a private concern. [39]

It seems to me, your Honor, that that goes directly to the question of when is this valuation. Here is another interesting feature in that regard, as I gather from the various instruments that have been filed by the various parties. Unfortunately for myself, I did not get into this action until a week ago Friday, and I am at a bit of a disadvantage, but it seems that in March, 1945, and that was after this amended complaint had been filed, the representatives of the Tavares Construction Company and their associates found it necessary to endeavor to establish just exactly what it was that the government was seeking to do by this action. In other words, there isn't anything in the amended complaint that would indicate on the face of the pleading that the purpose then was any different than the original purpose. In the original complaint it indicates that they proposed to condemn a fee in the property.

So in March of 1945 a motion was made to compel the government to file a bill of particulars so that it could be

determined as to just what it was that was being sought as against these other defendants, and it seems to have been as a result of those proceedings that it was then made plain that it was the government's purpose to acquire by the condemnation proceeding Mr. Tavares' company's leasehold, and his option, and any other interests that he might have, so that where the action started out as one to condemn property to [40] put the Tavares interest in charge of the property, it has now wound up to and has changed its character in some fashion so that now it seeks to take away from Tavares everything that he and his associates had in the first place.

I cite those things as demonstrating, and I think it is demonstrated beyond any possible argument, that there has been a complete change of what was sought in this proceeding between 1942 and 1944, when the amended complaint was filed, and when the declaration of taking was filed and when the money was put up.

Now, if we treat this as a condemnation proceeding whereby title passes in 1944, as declared by the act of the department, if we treat it as being at that time that the government decided that they were going to take this property for a navy yard, and we are going to take not only the interests of National City and other properties, but we are going to take also the interests of the Tavares Construction Company, then it would seem like in all reason we should treat it as an action commencing in 1944.

Now, I have looked as diligently as I could to find out what is the effect, in so far as determining the question of the time of valuation is concerned, by a case where the action is commenced and the declaration of taking is filed subsequent. I have found two or three cases that have

to do with that, but in none of them has there been involved any such [41] state of facts as are here, in none of them has there been involved the question of public property, and in none of them has there been involved the question of a change in the purpose of the entire suit. It has been held that where the declaration of taking is subsequent to the filing of the suit that the owner of the property may be permitted, if you please, to fix his valuation either at the time of the commencement of the suit or as of the time that they took possession, but in all the cases I have found that seems to be merely for the question of deciding when shall the interest start from, and they hold, and I think correctly, that in the ordinary case they may value the property as of the time when the government actually physically takes possession, and give to the owner of the property interest upon that entire award up until the time that the government makes its declaration of taking and deposits its money and the title passes. But I do not find that that is compelled by a statute. That appears to be merely the ruling in the various cases of the court for the purpose, if you please, of promoting substantial justice, and in none of those cases do I find that there is involved what as a matter of common knowledge is involved here in San Diego, that there has been a sharp change in market values between the two dates. That is a matter of common knowledge, that the market values in and about San Diego have changed tremendously between 1942 [42] and 1944. If we go around the town, as to ordinary properties we find cases where market values have doubled in that time. So from the standpoint of National City, and it is to that alone that I am addressing this matter, we find that the taking in the first instance, or, I mean the action in the first instance prior to the taking was for a purpose that

is entirely questionable. The power of the court to take public property so that the government may on the following day, within 24 hours, give an option to a private concern is, I submit, very questionable. But whatever that purpose may have been, it is now apparent that that purpose has been entirely abandoned in this action. The government does not seek it now for that purpose at all, and if the rule allowing the owner of the property to take back and set his valuation back at the time of the first taking is to promote substantial justice, and I find nothing else given as a reason for it, I would say with equal propriety, for the purpose of promoting substantial justice, if the market value of the property has changed, so that when they finally undertake to take for the purpose that now prompts them to bring this case on for trial, and when they abandon that first purpose, when they comply with the statute and cause the title to then be transferred to the United States, then I submit in all fairness and justice the time of the valuation should be the time when the title was taken over. [43]

I submit that does no injustice to the government, and particularly for this reason, that the matter of filing a declaration of taking and causing title to transfer, and under the War Powers Act they may get possession, but the right to fix the time when title will be vested in the government is entirely within the government's control. They could have filed a declaration of taking at the commencement of this action. They could then have put up the money. They could have then proceeded to take the property, if they really wanted to take it at that time. They did not see fit to do so, and, as a matter of fact, by the showing that their counsel made at the time of the motion to dismiss, they had apparently then come to the

frame of mind that they were no longer particularly interested in that taking. They conceded that the purpose that they wanted to take it for was now no longer a motivating purpose, but that they would like to have the action merely continued over a bit, as expressed by counsel, because it might be that the Navy Department would want to take the whole thing over and take it from there.

We submit that that is a complete abandonment of that original taking and of the original purpose, and that our valuation should properly be fixed as of that time, because, after all, that is when they ultimately decided to take title. [44]

One of the reasons I have been so insistent in wanting to present this beforehand was because by reason of these various things the witnesses, as I talked to them, were somewhat confused as to the proper basis for the valuation. One of the first things that bothered them was the fact that anyone familiar with tidelands knows that there is a constitutional provision against the transfer of the lands or the vesting of them in individuals, and the question seemed to bother some of the witnesses as to how you could base an opinion on the reasonable market value of something which cannot be sold. It is our position, however, that that is all eliminated, that what the government takes is a fee, and, obviously, in all fairness that is what they should pay for, and I take it from the memorandum that has been filed on behalf of the government that they are in accord with that purpose. I have the feeling, therefore, that we should have a fee and that there should be awarded to the State the valuation of their reserved interests, and which I was agreeably surprised to hear now was \$1.00. That was the first time I heard that, today.

As to the San Francisco Bridge Company, which held the lease, the value of that leasehold interest will have to be determined. We have discussed it some and we had some hope we might agree amongst ourselves as to the percentage of the piece of land that was affected by it. But, in any event, [45] unless we do so agree, then it will have to be determined. But it is my contention, on behalf of National City, that the witnesses should testify as to the reasonable market value of this property as of 1944, at the time title passed, and that that amount, whatever it is, should be awarded to National City. [46]

Now, one other thing that has been mentioned this morning, but counsel have not argued it. That is the question as to whether or not the so-called unit rule should be applied as between National City and the various interests represented by the Tavares Construction Company. I take it that it is the position of counsel representing them that the unit rule, because of the peculiar situation involved here, should not apply, and with that I am in accord. It seems to me that there is involved particularly an interest created by their own act, which is something over and above and different from the interest raised by any lease that would be given by the owner of the property. In other words, National City had nothing to do with the giving of that option. That was something which the government created, another and different thing, and for that reason it has been our position that the interests of the Tavares Company and associates and the interests of National City are entirely separate.

Mr. Landrum: If your Honor please, may I say just a word? I call your Honor's attention to this very same question that was raised by a motion to strike the answer of the San Francisco Bridge Company in this case, and

your Honor ruled upon that question. Your Honor's ruling is dated April 7, 1945. Counsel appeared before your Honor. The government filed a motion to strike certain allegations of the answer of the San Francisco Bridge Company upon the ground [47] and for the reason that those allegations of this answer undertook to set up that they were entitled to the value of this property as it had been improved by the government of the United States. The United States made a motion to strike that answer and your Honor granted it by your order which was dated April 7, 1945.

It simply boils down to this, as I understand counsel's position. It is his position that the city of National City claims to be entitled to this land or water, whatever it is, as it existed on the 23rd day of November, 1944, when the government of the United States had spent hundreds of thousands of dollars in there dredging and improving it.

I only know of two condemnation cases, your Honor, along this line. One of them happens to be the Miller case in 317 U. S. 369. I had the honor of trying that lawsuit, and the question here is plainly answered in it. The Supreme Court of the United States said that they were restricted to showing the value of the land which was acquired, in the Miller case, clear back to 1937. The Central Valley Project had at that time been announced. I am sure your Honor is familiar with the Miller case. It answers counsel's question precisely and, in addition to that, the law of the case has been made by your Honor in the San Francisco Bridge Company matter. And, if the position is correct, then, as the United States Supreme Court said in the Miller case, the [48] government will not be required to pay for something it itself has made.

There isn't any question but that he is not entitled to claim the valuation as of December 23, 1944, what the government has expended in making that land what it was at that time.

So I again tender to the city of National City a stipulation letting them fix any reasonable date within the year 1942. And may I reply just briefly to that, your Honor? The matter that I am presenting is not a question of any valuation caused by any improvement made by the United States government. The question is the market value of the property in that two-year period has greatly increased but that hasn't anything to do with what the United States government did at all. That is merely a change in conditions. So long as they have been the original basis of the taking and so long as by the very natural process of the change in valuation that has taken place the property has become tremendously more valuable in the meantime, then I submit we should be entitled to have that reasonable value, that reasonable increase in value, regardless of anything that the government may have put on there. We are seeking to take advantage of the natural increase in the value of the property.

Mr. H. G. Sloane: Your Honor, a motion to strike was made in April, 1945. It had nothing to do with any of the valuation as of 1944. The fact is that the summons and com- [49] plaint in this cause were not served on the San Francisco Bridge Company—I can't speak for the other defendants—until January 23, 1945. That was the first official cognizance that we had of the pendency of the action. That is the first time that we were ever furnished with a description showing what property was sought to be taken, and it there appeared that the govern-

ment was seeking to take a parcel of land, our portion being what is designated as Parcel 7 and a parcel designated in the amended complaint, which was served with the summons, as Parcel A. I quite agree with counsel for the government that the sensible thing to do and the only way to avoid confusion here is to fix a rough average, if it must be, as to the date of taking. He suggests 1942, December, 1942. We are merely suggesting 1944. And there is no justification whatever, that I can see, for including in a condemnation action which was filed in 1942 the description of 30 or more acres of land which was not even referred to in that condemnation proceeding and which was not a part of the pleadings in the case until the date of the supplemental and amended complaint, which was along in 1945, as I recall it.

The Court: Is that Parcel A?

Mr. Sloane: Parcel A, the water area. Now, I concur in the theory advanced by Mr. Monroe that the whole picture presented here is that of abandonment of the original proceeding, a diversion to a different purpose, the inclusion of a [50] greatly increased parcel of land, and the prosecution then, for the first time, began in earnest. As your Honor will recall, the matter went without action for years and it was not until a motion was filed for a dismissal of the action that the government was stirred into real activity.

We must not lose sight of the fact this is the government's case. This is the parcel of land which they sought to condemn. They produced their descriptions and, in their own due season, served them on counsel.

If I may just advance the position of one of the parties to this action, who has a mere bagatelle of about \$90,000 involved, we were brought into the case, on January 23,

1945, by service of summons and an amended complaint. On looking at the complaint, we found in there that there were two parcels of land in which we have an interest. We put in an answer setting up our interest. The motion which was brought before this court to strike had nothing to do with values as of 1942. It had to do with values at the date of filing our answer, which was in 1945, and it was only based on the provisions of the statute of the State of California that, where there has been an inexcusable delay of this sort of thing, bringing a condemnation suit to trial, the defendant may, at its option, defer the date of valuation to the time when the case becomes active and when the case is brought to trial. That is a very salutary provision which I think could be incorporated [51] into the federal practice. But your Honor held that that was a matter of substantive benefit and, hence, it was not controlled by the statute of the State of California. Therefore, the order of this court was made merely striking out those portions of the answer which were incorporated, supposedly, in pursuance of the procedure authorized by State statute. I have before me the order granting the motion to strike and have before me the complaint, portions of which were stricken. There were two portions there, one, in which the city of National City set up the fact it had exercised an option, which I think was immaterial, and it was stricken. The other point to which counsel refers was our claim set up in this language in the answer of the defendant San Francisco Bridge Company to the amended and supplemental complaint:

“VI. That the value of the estate and interest of this defendant in said lands taken and sought to be condemned by the plaintiff was on the date of issuance of summons the sum of \$90,000 and now is the

sum of \$150,000, that improvements were put upon the property subsequent to issuance of summons, but the service of summons has not yet been made on this defendant; that this action cannot be tried within one year after the date of commencement thereof and no delay has been caused by this defendant.

"Wherefore, defendant San Francisco Bridge Company prays for judgment in the sum of \$150,000, for lawful interest, [52] and for all other proper relief."

That had no relation at all to the year 1942. It had relation to the year 1945. We are entitled to damages as of the date when the trial was deferred to and the matter was first brought up for adjudication. The court ruled against us on the latter point but made no attempt to rule on the former point. So the question here is a matter of first impression in this case, as to whether the date for compensation shall be 1942 or 1945. How can it possibly be 1942 as respects Parcel A? The government has given no indication, as far as the record shows, that it had any interest in it then. Parcel A was brought into the action for the first time by the amended and supplemental complaint. And it is our position that, therefore, there was a virtual abandonment of the prior taking and a new action was commenced and all the matters are now before the court.

Mr. Landrum: If your Honor please, I might say another word. if I may be permitted to do so. I have been in this case about three weeks. I have examined this record and I have heard the statement made time, time and time again, that the government of the United States had sought to condemn this property and to turn it over to the Tavares Construction Company. If your Honor please, there isn't one scintilla of evidence in our files to that

effect, and the very evidence that is in there in that contract of December 28, 1941, with [53] the Tavares Construction Company, does specifically contemplate that this property may be turned over to any branch of the government of the United States. I have found nothing to substantiate the statements that this action was brought for the purpose of turning this property over to the Tavares Construction Company. The original petition in condemnation asked for a fee simple title. And Judge Yankwich was unquestionably correct when he said that we had taken whatever interest the Tavares Construction Company had in this property.

The Miller case goes clear back to 1937, when the plans for the Central Valley Project were first commenced, and we didn't start the lawsuit until years after that, and the Supreme Court of the United States said that we would value that land as it existed when the plans and announcement of the Central Valley Project were first approved by the Congress of the United States. And we hadn't been in there for years after that.

The Court: I am inclined to think that the Miller case settles the issue, and by the Miller case I mean the decision of the Supreme Court of the United States in the case of United States v. Miller.

The only phase of the inquiry concerning which there may be some measure of doubt is presented as to Parcel A here.

As I recall the factual situation and, if the court is [54] not correct in its recollection, you may call my attention to it, there was no token for title to Parcel A, either in the original petition of the claimant or in any other procedural memorial, until the declaration of taking was filed.

Mr. J. M. Martin: If your Honor please, there was an amendment made for the purpose of taking in Parcel A. That amendment has been overlooked. That was an amendment dated September 23, 1924, by which Parcel A was added to the original complaint.

The Court: That was the first memorial as to Parcel A?

Mr. F. L. Martin: That is correct, your Honor, and it was included in the general declaration. In October, 1944, there was an amended declaration of taking, or I will call it a second declaration of taking, which took Parcel A. That was before the general amended declaration we have been referring to, as of December 23, 1944.

The Court: It would seem, even under the broadest interpretation of the Miller case and the doctrine stated in it, that as to Parcel A probably the date of the fixing of its value is different than the other parcels which were included in the original petition. As I recall the Sunset Cemetery case, in the Seventh Circuit, it indicates the pertinency and effectiveness of a declaration of taking, and that constitutes a muniment of title as far as the government is concerned. That is true particularly with respect [55] to Parcel A. It can be, I think, argued that the date of compensation should be fixed as at the time when that parcel was first included in the acquisition.

Mr. Landrum: If your Honor please, the Sunset Cemetery case, as I recall it, was a case in connection with the Curtiss Wright Airport in Chicago, where the Cemetery Association had a right of easement across the Airport. I was in the trial of the Airport case. But the Miller case says this, and I want to try to explain it as plainly as I can. It isn't the date of taking that determines the question of when we shall determine value. They are two separate

and distinct things. In the Miller case the court restricted the landowners to a valuation of 1937, as I recall it. The facts of the matter are that they went up there and bought a lot of this land and subdivided it into lots. We moved the Southern Pacific Railroad out and had to take some of their lots, and they wanted the value as they had subdivided it. The court held them to a valuation as of the date that the actual construction of the Shasta Dam had become public and it became known that this land was going to be included in that project. My position is this, that the date upon which we took Parcel A was the date when we actually went in there and interfered and started dredging it. That certainly was notice to the world that that was within this project, when we went in there and did that. They are two separate things. The date [56] of the taking and the date of valuation are two separate and distinct things. It is the date of valuation that we are contending for here and that is the time that we just went in and did extensive dredging on Parcel A.

Mr. Monroe: Might I reply to that, your Honor? The place where that argument completely breaks down is the fact that the real complexity in this case is caused by the fact that they are proposing, as to a part of them, to value the land as of 1942, and, as to part of them, as to 1944, and there is nothing in the pleadings to substantiate the distinction.

The Court: The Supreme Court stated in the Miller case, reading from the decision on page 374: "Respondents correctly say that value is to be ascertained as of the date of taking. But they insist that no element which goes to make up value as at that moment is to be discarded or eliminated. We think the proposition is too broadly stated. Where, for any reason, property has no market,

resort must be had to other data to ascertain its value; and, even in the ordinary case, assessment of market value involves the use of assumptions, which make it unlikely that the appraisal will reflect true value with nicety. It is usually said that market value is what a willing buyer would pay in cash to a willing seller. Where the property taken, and that in its vicinity, has not in fact been sold within recent times, or in significant [57] amounts, the application of this concept involves, at best, a guess by informed persons."

Parenthetically, I think that is an axiomatic truth there. Continuing with the Supreme Court's observation:

"Again, strict adherence to the criterion of market value may involve the inclusion of elements which, though they affect such value, must in fairness be eliminated in a condemnation case, as where the formula is attempted to be applied as between an owner who may not want to part with his land because of its special adaptability to his own use, and a taker who needs the land because of its peculiar fitness for the taker's purposes. These elements must be disregarded by the fact finding body in arriving at 'fair' market value.

"Since the owner is to receive no more than indemnity for his loss, his award cannot be enhanced by any gain to the taker. Thus, although the market value of the property is to be fixed with due consideration of all its available uses, its special value to the condemnor as distinguished from others who may or may not possess the power to condemn, must be excluded as an element of market value. The district judge so charged the jury, and no question is made as to the correctness of the instruction.

"There is, however, another possible element of market value, which is the bone of contention here. Should the

owner have the benefit of any increment of value added to the [58] property taken by the action of the public authority in previously condemning adjacent lands? If so, were the lands in question so situate as to entitle respondents to the benefit of this increment?

"Courts have had to adopt working rules in order to do substantial justice in eminent domain proceedings. One of these is that a parcel of land which has been used and treated as an entity shall be so considered in assessing compensation for the taking of part or all of it."

Then it discusses the question of severance damages and then, continuing: "If a distinct tract is condemned, in whole or in part, other lands in the neighborhood may increase in market value due to the proximity of the public improvement erected on the land taken. Should the government, at a later date, determine to take these other lands, it must pay their market value as enhanced by this factor of proximity. If, however, the public project from the beginning included the taking of certain tracts but only one of them is taken in the first instance, the owner of the other tracts should not be allowed an increased value for his lands which are ultimately to be taken any more than the owner of the tract first condemned is entitled to be allowed an increased market value because adjacent lands not immediately taken increased in value due to the projected improvement."

I don't know just what that statement means. I think the [59] first part of it probably leans to the thought that the enlarged taking, the inclusion in an acquisition of lands which were not originally acquired, where the owner of such excluded lands retains area until later, may be able, in an appropriate proceeding, to show the increased value or increment that has resulted from the time

of the original acquisition to the time of the increased acquisition by the inclusion of his area. But the latter part of the statement would seem to remove that from consideration.

I can't reconcile the theory of just compensation as to Parcel A with the position of the government that, regardless of whether they included Parcel A in the original acquisition, or whether it was in the mind of the government at that time, in the construction of the project, to acquire it; that "we didn't acquire it but later on we did manifest a token," as Mr. Martin has suggested, "in October, 1944," that that was to be a part of the acquisition.

Mr. Landrum: Your Honor, may I state just this with relation to that Miller case? Here is the position which the government takes, that, on the first day of April, 1942, the government had already started the construction of this shipyard, and, in 1942, as a part of the construction of that shipyard, they went, with dredges, on Parcel A and dredged it out. It is our position, under the Miller case, that right on that date, whenever it was that they went in there, [60] they showed by their actual work on Parcel A that it was a part of this shipyard and that that is the date that it should be valued. They went in there and spent hundreds of thousands of dollars dredging out Parcel A, that is a part of the shipyard. They went in there on that date and were dredging it out and took possession of that land, and I believe the Miller case holds that that is the date of valuation.

I feel, if your Honor will give me just a moment to look at that Miller case, I can pick out what I am talking about.

The Court: You may take more than a minute, if you wish.

Mr. Landrum: In that case the court restricted them and, when they argued a hypothetical question as to what was their opinion as to the fair market value on such and such a date, my objection was that it included an increment due to the taking, and the court restricted them back to 1937.

The Court: And because the government, through the action of Congress and through the appropriation act passed for the construction of the Central Valley Project, had indicated clearly and irrevocably the date of taking, but that isn't the situation here according to the statement of counsel, as I take it. Here the situation is changed but the Supreme Court said in the Miller case, in my judgment, those are factors which must be considered; that you can apply the rule of ipse dixit and say it is general but as to what the compensation shall be is based entirely upon the variance that [61] exists. Here the government commenced its proceedings to acquire a certain area and set up the area. Various negotiations ensued. Various transactions and agreements were made, and so forth. Then, after the project had begun, it was concluded that it should be enlarged, and Tract A was included in the acquisition.

It seems to me to say that those who have a compensable interest in Tract A should not be required to establish the interest as of a date when the government didn't take it, when the government made no manifestation, and that it would deprive the property owner of a right to introduce his evidence to show the difference in the situation between the date of the original acquisition and the date of the acquisition of Tract A.

Mr. Landrum: If your Honor please, if I follow your Honor, it is this, that they are entitled to claim Parcel A

in its condition as it was at the date of taking in 1944, with it entirely changed by virtue of the dredging the government had done on it.

The Court: I am not speaking as to what the evidence may show at all.

Mr. Landrum: I am concerned about that angle of the situation.

The Court: You will not get any indication from the court as to what line the evidence will take in the case. You [62] will get the date of acquisition, which will be fixed by the ruling at this time.

Mr. J. M. Martin: If the court please, in order to avoid any subsequent confusion as to what we refer to as acquisition, to my mind there seem to be two classes of acquisition, one, in condemnation, and the other is where the government simply goes and takes it. Our evidence will show we were directed to proceed upon this property and commence dredging upon Parcel A and that it actually commenced on the 27th day of August, 1942. If that be termed an acquisition as distinguished from a taking in eminent domain, I would like for the record to be clear that we are referring either to an actual taking or a taking through court action. It seems to me there may be two different rules apply. Had there been no condemnation and had an action been filed in the Court of Claims as of August 27, 1942, the value would manifestly be as of that date, but here the government, if the court finds there was an actual taking on August 27, 1942, subsequently files a condemnation suit. The question is not so much what has been considered as the change in the factual situation, not present in the Miller case, but this is a factual situation where there was an actual taking by the government having diirected my client to proceed.

The Court: That is what the court adverted to when it stated it is not going to indicate at this time to the govern- [63] ment anything that would foreclose a factual investigation of what the Supreme Court said are the factors in an endeavor to arrive at a just compensation for a taking. It may be that, at the conclusion of the case, the court would feel that the weight of the evidence required that an instruction be given to the jury that the date fixed by law for the valuation would be one date. It may be that the evidence would prompt the court to conclude otherwise. That would be a matter to be covered by instructions and not by any ruling at this time which would foreclose an inquiry as to the factors which may go to enable the jury to estimate a value. Do you understand that?

Mr. Landrum: I understand your Honor's position, but these expert witnesses must be given a date to work from. There is the difficulty. We will be very happy to proceed and I see your Honor's position, and I am very frank to say to your Honor that that is absolutely correct, but I am trying to get some sort of an understanding as to the date.

The Court: I don't see how we can do that.

Mr. Landrum: While we are discussing that, if I might be permitted to transgress on your Honor's time for just a moment, the question of the procedure in this case is important. Who is going to go forward tomorrow morning?

The Court: I think the defendants should go forward.

Mr. Landrum: Yes. And the government respectfully [64] moves the court in that connection that the landowners be required to go forward.

The Court: I think so.

Mr. Crouch: If possible, I think the burden should be upon the defendants and I think that the burden is upon the defendants in this case, and that the government has no right to ask the court to tell it the order of their defenses. It so happens in this case that all the defendants, after considering the evidentiary angles that are involved, deem that the case can best be presented to the court and the jury and can best be understood and that the convenience of everybody will be served by the order which we have already agreed upon.

The Court: Do you mean that the government has agreed upon it?

Mr. Crouch: Yes; the defendants have agreed.

The Court: The government has not agreed, has it?

Mr. Crouch: No. The government, we do not think, is interested.

The Court: All right. I just wanted to understand it.

Mr. Crouch: Just the court and us. In order that the testimony of the witnesses may be understood, in order that they may have a visual picture of what is involved, the defendants whom Messrs. Martin and myself represent, Tavares Construction Company, have prepared and will offer in evi- [65] dence a model of the plant and a map of the area and certain factual data on it, and then the witnesses that later come along will be able to point to the map and the model in explanation of their testimony, and the jury will get the picture clearly. But those matters cannot be presented if the city of National City is required to put on its case first. So, at the request of the city of National City, we have prepared all of the testimony of our witnesses, based upon the fact that we will present our case first, and the city of National City has prepared its witnesses on that sup-

position. And now, if that is changed at the instance of the government, we feel, as an interested party, the burden being upon us, that the defendants should be allowed to run their own side of the lawsuit and in their own way. [66]

Mr. Monroe: Might I suggest on that, your Honor, Mr. Crouch is correct as to what has taken place between the defendants. Let me say that from the standpoint of National City we are depending almost entirely upon some of the same witnesses as the Tavares Construction Company. There is a great deal of data that has to be built up as a preliminary to the testimony which we would put on. Because of the fact that we have this understanding with counsel for Tavares and the allied interests, those are matters which, frankly, we have not fortified ourselves on. Were we compelled to put on our case separate and apart from their testimony we would be seriously embarrassed in doing so.

Now, beforehand we figured that the most orderly procedure would be for them to put those witnesses on first. As a matter of fact, what will happen is this: As your Honor is aware, the issues are such that the great mass of the testimony that will come into this case has to do with those interests. What that is in, the matter of putting on the case on behalf of National City is going to be very much simplified. It will take us only a matter of a few hours to completely cover our case, but that is upon the theory that will already be built up, and it will be built upon testimony that would not otherwise be available to us. For that reason I respectfully ask that we be permitted to follow the procedure we have agreed upon. [67]

The Court: What is that procedure?

Mr. Monroe: That the Tavares Company first put on its evidence, and that then we follow with the evidence for National City.

Now, it may be as the case proceeds that it will seem orderly with some witnesses, when they have testified as to part of the case, that they complete their testimony at that time. We have felt, however, that it would be less confusing to the jury that where a witness testifies both as to the Tavares interests and as to National City, to let him first testify to their interests and then, if necessary, bring him back and not have it mixed up in that fashion.

Mr. Landrum: If your Honor please, I realized that we were getting somewhat into deep waters. This is another serious question in the trial of this action. If your Honor please, the interests of the City of National City and the Tavares Construction Company must necessarily be conflicting, in view of the provisions of the so-called lease and option that the government of the United States gave to the Tavares Construction Company, in that it provides that what the government of the United States has to pay for this land shall be a portion of what the Tavares Construction Company would have to pay to take up its option.

Now, their interests cannot be other than adverse because if what the City of National City was to get from the [68] government of the United States for that option goes to the question of how much Tavares would have to pay for it, it would increase the cost that Tavares would have to pay to the government. Therefore, it is to the interest of the Tavares Company, as I see it, if the court please, to reduce their verdict in this case.

Now, here is the way I see it, if your Honor please,—

The Court: You had better let them handle it and not have you handle it.

Mr. Landrum: All right. I feel that I should say that to your Honor, and in addition to that, if they come in here and place a situation before this jury by the Tavares Construction Company presenting its evidence, it will start that jury off with an entirely erroneous impression with relation to what this case is about, and we very earnestly suggest to your Honor that the procedure, in order that the jury may understand it, would be for the landowners to proceed with their evidence, followed by Tavares. We present that to your Honor, because we feel that that is proper. Now, if they have a map or if they have a model which is made by the Tavares Construction Company, that map and model showing the conditions as they existed after this yard had been built upon this land, certainly would not be admissible as to the bare land itself, but a jury is going to have it immediately, if Tavares proceeds first, and we feel, if your Honor please, [69] that it is absolutely the wrong way, but that they should start with the land bare and let the construction of the shipyard come upon it, and let Tavares present his claim.

Now, that is a matter for your Honor to determine. I realize that.

Mr. John M. Martin: If the court please, as I understand Mr. Landrum's argument, it virtually boils down to the fact that the government is of the opinion that to let the defendants proceed as the defendants think advisable might be unfavorable to the government and, therefore, the government wants us to proceed in the way it thinks is most fair to the government. This is rather an unusual request to make of the defendants, parti-

cularly where the government did not see fit to file two separate suits. They could have filed one against my clients for trial before a jury. They did not do that, and my clients were dragged into the law suit some two or three years after it started. They knew it would be tried in one law suit, before one jury, and I say to the court that we are entitled to make our defense as defendants in the best way we can so long as we abide by the rules and the discretion which your Honor may properly exercise. I do not think, because these facilities have been destroyed and no longer exist for the jury to view them as they would in the ordinary case, is any reason why we should not let the jury visualize the site as it existed on December 17, 1944, [70] when it was taken. We have prepared a model to show the facilities, to show the size of the bulkheads and quay walls, and everything else, as installed as of that time. What is the difference as to when the jury acquires that information if sometime before the defendants rest their case they are going to have all the facts before them? Why not let them have all the facts that existed? What I would like to do, and what I now ask permission to do, is to call our chief engineer and have him explain, as our first witness, this model, the scale to which it has been prepared, the areas which it shows, that it is correct; and the same with our general maps, which cover the soundings, show the dredged and undredged areas before we commenced our work of dredging. I would like to defer counsel's opening statement, and by that I mean my own opening statement as counsel for Concrete Ship Constructors, until we have put on one witness merely to identify the models and the maps, so that these exhibits may be received and so counsel in the making of his opening statement have the benefit of the clarity which can be gained by using the

maps and the models as received in the case. As I say, I would like the privilege of deferring the opening statement until that one witness may be called for the purpose of identifying those models and maps.

Mr. Landrum: Your Honor please, I will ask you to forgive me, but I understand under the rules that an opening [71] statement should not be an argument and, as I understand it and as I feel, it would be absolutely unfair to permit the bringing in of a model to be used in an opening statement. I say that to your Honor. If I am in error, I trust I will be forgiven.

The Court: We are going to follow the sequence of the litigation in the presentation of the proof. That is the only safe method of trying a case of this type. Then there is no psychology or atmosphere in the case, in an effort to arrive at the truth. That means that the property owners should proceed first with their proof, and then these other features, as between Tavares and the interests of National City, can be explored by proper evidentiary methods. That will be the order of proof.

Mr. Landrum: Yes, your Honor.

The Court: Now, can you give the court any idea as to how long it will take to hear the evidence?

Mr. Landrum: If your Honor please, could I transgress just one moment further? I want to state to the court now the position that the government of the United States is going to take, in so far as the evidence of Mr. Tavares under that contract is concerned. I have another memorandum here, your Honor. I realize that I could have opened this whole thing up the other day, but I have seen fit to try to make a little objection to the Tavares' evidence. I should like to present [72] that to your Honor, and if you want it, all right, and I will give counsel a copy.

The Court: I will take it.

Mr. Landrum: I do that because I want our position on that thing to be known absolutely at the beginning.

The Court: Did you present that to Judge Yankwich at the time of his ruling?

Mr. Landrum: No, sir, I was not there.

The Court: I am not speaking about you personally when I speak of the government.

Mr. Landrum: No, sir, it was not.

The Court: I am not speaking about any of you gentlemen personally, but I am talking about your respective interests.

Mr. John M. Martin: Might I ask the court this question, whether by the ruling is meant that each of the land-owners will be required to close his case before the Tavares Construction Company proceeds?

The Court: I am not going to anticipate anything, Mr. Martin. I told you what the order will be in the trial.

Mr. John M. Martin: The only reason I ask is in order that I may afford my witnesses the information as to whether it will take two or three days before they should return, or just when.

The Court: That is the question I just propounded.

Mr. John M. Martin: Very well. [73]

Mr. Landrum: Now, your Honor propounded a question as to how long it is going to take to present the evidence. I am firmly convinced that we can try the case in not longer than six days at the outside. I do not see how we can take that length of time. I promise your Honor that, so far as the government is concerned, we are not going to take much time in cross examination, and we will put on our case in chief in at least one day.

The Court: Now, I do not want to limit you, gentlemen, in your estimates as to time, but I want you to be as accurate as you can be. You have had a long time to prepare this case and ought to know about how long it will take.

Mr. Crouch: In order that we may be advised as to the procedure, after the City of National City has completed its case and rested, will the government then be required to put on its evidence as to that defendant,—

The Court: No.

Mr. Crouch: Or do you take the evidence of the other defendants first and complete it as to all of them before the government proceeds?

The Court: Yes, sir. The burden is on the property owner and his case should be presented first. He is dissatisfied and does not accept what the government wants to give him. It is his burden to establish what he is entitled to before the government is called upon to answer the case. [74] When he does that, then the government will be required to answer. There can be no doubt about that.

Mr. Monroe: I think I understand, your Honor. Now, may I be permitted to file an amended answer on behalf of the City of National City? The only amendment we care to make is to increase somewhat the demand as set up in the original answer. I might say this by way of explanation, that at the time of the preparation of the original answer it was prepared with the thought that the estate of National City was a limited estate on a right to collect rental. Now, if, as has since developed, and I think beyond any question that what we have is a fee, it makes a small difference in valuation, but neverthe-

less a difference which should be reflected in our pleadings.

The Court: I do not see how that changes the issues any.

Mr. Landrum: No, your Honor, if it is simply to increase.

Mr. Monroe: That is all it is.

Mr. Landrum: If he is simply increasing his prayer for relief, that is correct.

The Court: In other words, Mr. Monroe says that the original answer, and I think he is correct, did not assert the right on the fee basis of ownership.

Mr. Monroe: That is correct. We based our valuations merely on the basis that all we had was the right to collect [75] rentals, and I am satisfied that is not correct.

The Court: Any objection?

Mr. Landrum: I would ask these gentlemen to handle that.

Mr. Whelan: No.

Mr. Landrum: They say it is all right, your Honor.

The Court: It will be filed.

Mr. Sloane: Your Honor please, the San Francisco Bridge Company would like permission to file an amendment, but instead of raising my sights, my first application is to reduce them. In error we have alleged that the San Francisco Bridge Company had a lease of the entire area of parcel A, which would be something over 30 acres. That is not correct. It should be confined to the portion of area A, which is some tenths, or which amounts to about 10 acres.

The Court: I think you called attention to that in your memorandum.

Mr. Sloane: Yes. Also, I think it may be that during the course of the trial we may suggest that some amendment should be made. There is this further possibility on the line of argument brought forth this afternoon: We answered upon the theory that there was a taking of both parcel A and parcel 7 at the same time. Now, if it develops that there was a taking at two different dates, it occurs to me now that it may be in order to plead a valuation of what was [76] taken at the first date, together with severance damages, and the value taken on the second date. I am at a loss now to know whether or not it will develop, but counsel for the government has been so fair and open about prognosticating his movements that I wish to give notice that I may have to make an application to amend the pleadings to conform to the proof.

Mr. Landrum: And counsel's statement is a further indication of what deep water we are getting into when he talks about severance damages.

The Court: Without indicating any intimation that the motion may be later interposed, if it is simply a motion to conform to the proof, that as a matter of course will be proper. But if it is other than that, it will be denied.

Is there anything further to be discussed, gentlemen?

Mr. Landrum: That is all we have, your Honor.

The Court: Gentlemen, I want to say that there isn't any provision in the federal statutes for a daily transcript for the judge in a case of his kind, but if counsel—

Mr. Landrum: Pardon me, your Honor.

If your Honor please, there is one other matter which Mr. Martin and I talked about. That is the question of an alternate juror. For the purpose of the record, and

in order that there may be no question, the government desires to tender to the gentlemen on the other side a stipulation to the [77] effect that should an occasion or a situation arise at any time throughout the trial of this action, even after the jury has gone into the jury room to deliberate, that we will stipulate and agree if your Honor in your discretion should see fit for any reason to excuse one or more members of this jury, the remaining members may return a verdict and it will be accepted by all parties.

The Court: What is your attitude, gentlemen?

Mr. John M. Martin: So stipulated, your Honor.

Mr. Monroe: So stipulated.

Mr. Sloane: So stipulated.

Mr. Muir: So stipulated.

The Court: So understood by all of the parties.

Now, gentlemen for the defense, I did not get any indication from you as to what you thought would be the time required for the proper presentation of your evidence.

Mr. John M. Martin: May I ask one question before answering that?

The Court: Yes.

Mr. John M. Martin: I would like to ask permission of the court for the deferring of my statement as to what we intend to prove until we come to the time to put on our evidence. In other words, if National City is going to have its witnesses consume two or three days time, I think it would be confusing to the jury for me to make my opening statement [78] first, and confusing to my own case.

The Court: I think each side should have the opportunity at the appropriate time to make its opening statement. I do not believe that the defendants should be

required to consolidate their opening statement into one opening statement. Each defendant should have the right to present his case to the jury, and his attorney will have a right to make an opening statement preceding the presentation of his case, and which I take it will be an opening statement and not an argument.

Mr. John M. Martin: That is right.

The Court: And knowing counsel, I think that will be true.

Mr. John M. Martin: That is right. In other words, if I am to be prepared to make an opening statement tomorrow morning, I would like to know it, and as I get your Honor's position, I will not be required to make the opening statement until I am ready to present evidence on behalf of my clients.

The Court: That is right. I think perhaps the other interests could be presented tomorrow, that is, Mr. Muir on behalf of the Johnsons, the property owners, and then National City.

Mr. Monroe: I would think, in answer to your Honor's question, so far as National City is concerned, I would hope [79] to put in our evidence in a day or a day and a half. I realize that some of the other interests will require quite a bit more time.

The Court: Can you give any indication as to how long you will take?

Mr. John M. Martin: I think it will take us about three days, plus whatever time counsel for the government will take on cross examination.

The Court: Very well, gentlemen. If that is all, we will meet tomorrow morning at 9:30.

(Whereupon, at 3:30 o'clock p. m., Monday, February 17, 1947, an adjournment was taken until 9:30 o'clock a. m., Tuesday, February 18, 1947.) [80]

San Diego, California, Tuesday, February 18, 1947.

9:30 A. M.

The Court: The record may show all present. Proceed.

Mr. Berrey: If your Honor please, Leonard McLaughlin, who was not served with notice of trial in this case, and who is a lessee on one parcel from National City, has appeared and is willing to submit to the jurisdiction of the court and have his appearance entered, your Honor.

The Court: Leonard McLaughlin?

Mr. Berrey: Leonard McLaughlin; yes, your Honor.

The Court: What interest does Mr. McLaughlin claim?

Mr. Berrey: He claims a lease on Parcel 8, a lease from National City, your Honor.

The Court: There should be some memorial filed in the record. Probably you gentlemen could assist him. Haven't you an attorney, Mr. McLaughlin?

Mr. McLaughlin: No, sir.

The Court: Do you expect to employ an attorney to represent you in the case?

Mr. McLaughlin: I was going to leave it up to the National City people to make a decision. I think the National City people are fair enough that, whatever my share is, I will get it.

Mr. Berrey: If the court wishes, the government will assist Mr. McLaughlin in preparing an answer and filing it, [83] setting up his interest.

The Court: I think it would be well to do that. Have you conferred with the gentleman, Mr. Ratelle?

Mr. Ratelle: Your Honor, Mr. Merideth Campbell, the present City Attorney, as soon as he comes, I will intro-

duce Mr. McLaughlin to him and they can see what they can work out.

The Court: Very well. Mr. McLaughlin, your appearance will be noted in the record and appropriate recognition of your rights, if there are any, will be considered in the final decree. It would be well for you gentlemen to get in all interested parties so that, when the case is concluded, it will be finished, and the government is more interested in that, I think, than the others. So that, if you will collaborate with the gentleman, I will appreciate it. His appearance should be properly noted in the record. Proceed with the evidence.

Mr. Muir: May it please the court, I understand that the defendants Carl Johnson and Pearl Johnson proceed first.

The Court: Yes, sir.

Mr. Landrum: If your Honor please, I take it the purpose is to make opening statements to this jury with relation to what it is that each of the parties proposes to prove. Inasmuch as we are now about to proceed with relation to the land itself, with your Honor's permission, I would like to split the government's opening in that at this time I [84] would like to confine myself to the interests of the land itself and then, when we come on with the other portion of the case, when Mr. Martin makes an opening statement with relation to the Tavares Construction Company, I would like to state the government's evidence with relation to that at that time.

The Court: I think so. I reviewed the record a little more thoroughly over the night and this morning and I am satisfied and confident that these interests, other than the land interests and the valuation of fees, are entirely separate from the ordinary and initial proceedings at this time. So that, ladies and gentlemen, we will now take up

the matter of the estimates of fair compensation for the taking of the real property. And the alleged owners or claimants in that property will proceed with their case. If you want to make an opening statement along those lines, you may do so. This interest pertains to what is known as Parcel 9. Mr. Muir, representing the Johnsons, owners of that property, will proceed. You may proceed. [85]

Mr. Muir: Your Honor, counsel, and ladies and gentlemen: I represent two defendants, Carl Johnson and his wife, Pearl Johnson. They are the owners of the land known as parcel 9 in this litigation. We are claiming \$8,000 as the reasonable market value for the fee title of this land, together with interest as shall be determined by the court to be allowable.

Now, we will offer evidence in support of our claim for \$8,000. This property is about one acre in size, located in the area referred to, and it had one improvement on it of a building, a corrugated building. It was adjacent to the Santa Fe spur track and was near the water front, as you will see from a map that will be brought into evidence. So as our first witness we would like to call—

Mr. Landrum: Just a moment. If the court please, might I be permitted to make the government's opening in so far as the land is concerned at this time?

The Court: I don't know about that. Are you going to dispute anything that Mr. Muir said about it?

Mr. Landrum: Yes, your Honor. I thought that we would proceed, if I might be permitted to suggest, by my making an opening at this time with relation to the gov-

ernment's position on all the land matters, but whatever your Honor wishes. I will defer the opening if that is what your Honor feels I should do. [86]

The Court: I think so.

Mr. Monroe: If your Honor please, I was wondering if you would prefer to have at this time the opening statement of all of the landowners?

The Court: The only preference the court has is the orderly presentation of the case, so that it may obviate and avoid, if possible, any confusion both in the court's mind and counsel's mind, and the jury's mind. I think perhaps as each interest is presented that that would be the appropriate time for respective counsel to make an opening statement. I cannot understand what the government means. I did not observe anything in Mr. Muir's statement that would be contradictory. What would be the purpose of it?

Mr. Landrum: My thought, if your Honor please, was that I would proceed and simply outline to the jury the government's testimony with relation to the entire question of land values at this time, in accordance with what counsel has just suggested.

The Court: I think in view of the fact that it was suggested in the memoranda and on yesterday reiterated that the government would withhold its case until the defendants had produced their respective evidence, that we had better adhere to that policy.

Mr. Landrum: Yes, your Honor.

The Court: Proceed, Mr. Muir. [87]

Mr. Muir: I will call Mr. Johnson.

Mr. Landrum: If your Honor please, we have agreed that a little map that I have here covering all of these parcels might be placed in evidence by stipulation on behalf of the defendants and also of the government.

The Court: Is that satisfactory, gentlemen for the defense?

Mr. Crouch: Just a moment. Yesterday your Honor will recall—

The Court: Will you raise your voice a little, Mr. Crouch?

Mr. Crouch: Yesterday we desired the privilege of having a map presented, showing everything, and counsel objected to that line of procedure. Now he brings a map in.

The Court: Have you any objection to this?

Mr. Landrum: Tavares is not interested in the land benefits. We are trying the land now.

The Court: I do not want constant argument between counsel in this case.

Mr. Muir: Defendants Johnson object to the map in that it does not truly portray the exact situation back in 1942, as we see it. For example, the spur track is not indicated on the map, and which is a part of the terrain there, a part of the landmarks, and I think that is important.

Mr. Landrum: Your Honor please, I am sorry. I thought [88] we had agreed that it was to go in.

The Court: Proceed.

Mr. Crouch: I withdraw any objection.

CARL A. JOHNSON,

called as a witness by and on behalf of defendants Carl A. Johnson and Pearl Johnson, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: Will you state your name, please?

The Witness: Carl A. Johnson.

The Clerk: Be seated, Mr. Johnson.

The Court: Your objection is still in the record, Mr. Muir. Do you insist upon it?

Mr. Muir: If the government will stipulate that there was at the time a Santa Fe spur track running along the water front there, I will be glad to stipulate.

Mr. Landrum: I am very happy to stipulate it, if counsel tells me there was a spur track, and he has told me. I will agree it was there.

The Court: What is the attitude of the City of National City?

Mr. Monroe: That is agreeable.

Mr. John M. Martin: We expect, if the court please, to introduce our map and call our engineer, and we expect every other defendant to have a like privilege. [89]

The Court: Mr. Sloane? Is he here representing the San Francisco Bridge Company?

(No response.)

The Court: He does not seem to be here this morning. The map may be filed as an exhibit for the purpose of illustration.

Mr. Landrum: If the court please, could I ask who marks the exhibits in your Honor's court?

The Court: The clerk will mark it.

The Clerk: This will be marked as Plaintiff's Exhibit 1, your Honor?

(Testimony of Carl A. Johnson)

The Court: Yes.

(The document referred to was marked Plaintiff's Exhibit No. 1, for identification.)

The Court: Is there no one representing Mr. Sloane in the court room this morning, or the interests of the San Francisco Bridge Company?

(No response.)

The Court: The record will so show.

Mr. Landrum: Your Honor please, we offer Plaintiff's Exhibit 1 pursuant to the stipulation.

The Court: It will be so received.

(The document, heretofore marked for identification Plaintiff's Exhibit No. 1, was received in evidence.) [90]

[Plaintiff's Exhibit No. 1—Map of Parcels. See original.]

The Court: It might be well to put that on an easel.

Mr. Landrum: May I approach the easel, your Honor?

The Court: Yes. We will move it around a little later, ladies and gentlemen, so that you can see it.

Mr. Monroe: How about putting north at the top?

The Court: The record shows that Mr. Sloane is in the court room now. Mr. Sloane, there was a map offered here, and all of the parties agreed to it, but you were not here and no one representing your client.

Mr. Sloane: That is acceptable. I ask your Honor's indulgence. I thought the opening hour was 10:00 o'clock.

The Court: There is some excuse the first day, but from now on there will not be any.

(Testimony of Carl A. Johnson)

I think you had better put the easel around in front so that the jury can see it.

Mr. Landrum: It is rather difficult to lift it over there, your Honor, but we will try it. It is heavy.

The Court: I hope you citizens of San Diego can get together in an attempt to get a new court room, in keeping with this great metropolis at the present time. [91]

Mr. Muir: May it please the court, the defendants would like to offer a map of the harbor of San Diego, if the government is agreeable.

The Court: The harbor as of what date?

Mr. Whelan: As of January, 1945.

Mr. Landrum: That is objected to, if your Honor please, on the ground and for the reason that it does not depict it as of the time in question. We have no objection if they have a map as of the time of the taking, none whatever, but this contains soundings and things of that kind as of 1945 and 1946.

The Court: The objection is sustained.

Mr. Muir: We would like to offer it simply for the shoreline and general topography of the area, not as to soundings.

The Court: Have there been any changes—

Mr. Landrum: If it is offered simply for the purpose of showing the surroundings there and the situation and not anything else, we don't object.

Mr. Whelan: There may have been a lot of changes in that South Bay area in the last two or three years. Counsel may not be quite as familiar with these facts as I am. It is principally a sounding map, as I see it.

The Court: I will take a look at it.

(Testimony of Carl A. Johnson)

Mr. Landrum: I renew the objection, if your Honor please. [92]

The Court: The ruling will stand. The objection is sustained.

Q. By Mr. Muir: Mr. Johnson, what is your business or occupation?

A. I am a distributor of petroleum products.

Q. What company? What refinery do you represent in this area?

A. The Sunset Oil Company.

Q. How long have you been engaged in that business?

A. Before the Sunset, I would say about 14 years.

Q. How long have you been engaged in the petroleum industry?

A. About 20 years.

Q. In connection with your distribution of petroleum, do you have to have any particular facilities for that purpose?

A. I have to have a bulk plant.

Q. When you refer to a bulk plant, what do you mean?

A. Your tanks and storage and headquarters, with your office, and a place for your trucks.

Q. The tanks are of a dimension about as high as this room and from the pillar to the wall in the back of the room?

A. I would say so. The tanks we have at the present location hold 20,000 gallons.

Q. In 1942, where was your bulk plant located? [93]

A. On Pacific Highway, directly across from Consolidated.

Q. Where is it now located?

A. On Main Street.

Q. Both places being in San Diego?

A. Yes, sir.

(Testimony of Carl A. Johnson)

Q. The present address is 1779 Main Street?

A. That is right.

Q. In the year 1942 and now, you and your wife, Pearl Johnson, were the owners of what is known as Parcel 9 in this litigation, is that correct?

A. That is right.

Q. I point out on this map, Plaintiff's Exhibit 1, the parcel indicated here in the sort of purplish or pinkish tone, dark pinkish tone, and ask if that indicates approximately the place where your land was and is located.

A. Yes.

Q. The map indicates Parcel 9 to be 1.02 acres, is that correct?

A. Yes, sir. It was approximately two acres, I think, the entire property.

Q. The parcel, though, known as 9, now under condemnation, is this portion, consisting of one acre?

A. That is right.

Q. When you referred to two acres, was there other [94] property you at that time owned?

A. Yes, where that ramp extends there. The entire block we owned.

Q. To the south, would you say? A. Yes.

Q. That is, south from the part indicated to 15th Street?

A. That is right. This dark line in between here is a 25-foot ramp that the government also took as a right-of-way from the ramp to the batching plant.

A Juror: Your Honor, may I inquire whether this is Pacific Highway there they are speaking of or Main Street?

The Witness: No. This is at National City.

(Testimony of Carl A. Johnson)

The Juror: This is at National City?

The Witness: Yes.

Q. By Mr. Muir: This property which we have been now discussing is the property which is the subject of this litigation, located in National City, is that right?

A. That is right.

The Court: All of this property, ladies and gentlemen, is in National City. I think, if you will withhold your inquiries, counsel will develop all of these factors by questions. They have prepared this case very carefully and have spent a lot of time on it, and you had better let them present it. Then, later on, if there is anything that you want [95] to inquire about, you may do so.

Q. By Mr. Muir: The property now that is known as Parcel 9, the subject of this litigation, is located between Cleveland Avenue and Harrison Street in National City, is that correct? A. Yes.

Q. Are you now the owner of the parcel of land which is indicated to the south, between Parcel 9 as indicated and 15th Street? A. No. I sold that in 1945.

Q. And to whom? A. To Dick Haas.

Q. Can you state the consideration?

Mr. Landrum: Just a moment, if the court please. That is objected to upon the ground and for the reason that it is improper as to time, the sale having taken place subsequent to the date of taking here, at least two or three years later, when conditions were entirely changed.

The Court: Sustained.

Q. By Mr. Muir: On this property, Mr. Johnson, Parcel 9, were there any improvements of any kind?

A. One building is all.

(Testimony of Carl A. Johnson)

Q. Describe the building and type of structure.

A. It was a former shed. It was about 15 by 22 or '3, made out of 2 by 4's and corrugated iron. [96]

Q. It was situated on Parcel 9? A. Yes.

Q. Can you give us the reasonable market value of that building as of November 10, 1942?

Mr. Landrum: That is objected to, if the court please, in that it attempts to give a valuation of only a portion of the entire whole, with no method of allocating that as against it all.

The Court: The objection is overruled.

Mr. Muir: You may answer.

The Witness: I would say it was worth about \$500.

Mr. Landrum: If your Honor please, I rise to ask whether or not your Honor has ruled that we are trying this case in accordance with the New Rules that say it will not be necessary, as I understand it, for me to take exceptions to your Honor's rulings.

The Court: Of course, the New Rules do not provide for exceptions but, for the purpose of appeal, you should preserve your record as you think you should preserve it. As far as I am concerned, either party may have an exception to any adverse ruling, without stating it, but I am not attempting to bind superior authority by that. You may encounter difficulties, if it is necessary to submit the matter to a superior authority.

Mr. Landrum: If your Honor please, may the record show, [97] then, that each side has an exception to any adverse ruling, without stating it?

The Court: It may so show as far as the court is concerned.

Mr. Monroe: That is agreeable to counsel.

(Testimony of Carl A. Johnson)

The Court: Do you all agree on that, gentlemen?

Mr. John M. Martin: So stipulated.

Mr. Muir: I so stipulate.

Mr. Landrum: If your Honor please, there may be some particular matter I would like to arise to take a particular exception to, outside of that.

The Court: As long as there are no arguments on the exceptions, you may do so, but I will not hear any arguments and no arguments on objections in the presence of the jury. I hope you all understand that rule, which is a rule of this court.

Q. By Mr. Muir: Mr. Johnson, what was the reasonable market value of this property, owned by you and Mrs. Johnson, of Parcel 9, on November 10, 1942?

Mr. Landrum: That is objected to, if the court please. He may state his opinion but he is asked now for a fact.

The Court: Overruled.

The Witness: Well, I base my value—

Mr. Landrum: Just a moment, if the court please. That is objected to as not responsive to the question. [98]

The Court: Overruled.

The Witness: I base the value of the property on when Tavares leased it from me, and they based their rental on their appraisal, is what they told me, my wife and I. When they took the property there, Mr. Bliss was paying me a hundred dollars a month rent, and they appraised the property—mama and I went in to see them—and they said they could only pay me \$40 a month. They appraised it at \$8,000 and established the rental at \$40, 6 per cent of \$8,000.

(Testimony of Carl A. Johnson)

Q. By Mr. Muir: In your opinion, the value, then, was reasonably the current market value of \$8,000 at that time?

A. Well, they are a big outfit. I believe they knew what they were doing.

Mr. Landrum: I don't believe, if your Honor please, that is responsive to the question. That is objected to.

The Court: Sustained.

Q. By Mr. Muir: Please state, Mr. Johnson, your opinion of the reasonable and fair market value of the property, of yourself and Mrs. Johnson, on November 10, 1942, that is, the land and improvements.

A. \$8,000.

Q. Referring now again to that property, can you tell us if there was a railroad track anywhere near that property and, if so, where? [99]

A. Right adjacent to it, on the ocean side, there was a spur track which was used by the cement works also for unloading carloads of cement.

Q. In other words, adjacent to it, at the point I am now indicating, just immediately to the west of the indicated portion of Parcel 9, you say there was a spur track?

A. That is right.

Q. Was that a track of the Santa Fe Railroad?

A. I don't know whether it was the San Diego & Arizona or Santa Fe.

Q. But it did service this property?

A. Yes; that is right.

Q. In and adjacent to this property were there other industrial units or residential property?

A. Other industrial units,

(Testimony of Carl A. Johnson)

Q. That is, wholesale firms and industrial manufacturing, is that right? A. Yes; that is correct.

Q. About how far would you say that the westerly line of your property was from the mean high tide line of the bay to the west?

A. Well, we used to have a pier there, with a pipeline going out and it was, it seemed like, at that particular point, before they started in work there, it wasn't only a couple of blocks. The pipeline ran out there half a mile out [100] in the ocean, where the barges could unload.

Q. That was an oil pipeline? A. Yes.

Q. In other words, oil barges could pull in through our harbor and unload through this to your property?

A. That is right. But the pipeline and pier were abandoned before any negotiations were taken up here.

Q. Before this litigation started?

A. Yes; that is right.

Mr. Muir: You may examine.

Cross Examination

By Mr. Landrum:

Q. Mr. Johnson, would you be good enough to tell us, so far as your recollection permits you, the date upon which that pipeline and pier to which you have referred was abandoned?

A. I would say it was at least a year prior to any negotiation.

Q. So, on the 10th day of November, 1942, there wasn't any pipeline and pier there at all?

A. No; that is right.

Q. Mr. Johnson, when did you purchase this land?

A. I think it was in February or March of 1942.

(Testimony of Carl A. Johnson)

Q. Who did you buy it from?

A. The Sunset Oil Company.

Q. On November 10, 1942, that property was leased to [101] someone, was it not?

A. That is right. [102]

Q. To only one person? A. No, two persons.

Q. Now, I understand you to say that you had a lease to Tavares; that is right, isn't it? A. That is right.

Q. Did you have a lease of a portion of it to someone else?

A. There was an overriding lease to a man by the name of Carl Bliss.

Q. What do you mean by an overriding lease?

A. I think the leases can be offered into evidence. I don't know too much about the leases, but, in other words, if at the time, as I understand, the Tavares were through with the property, then Lester Bliss could step over and take over for the balance of the term, or he could take it. In other words, Carl Bliss paid me \$35 a month rent for that privilege, and Tavares \$40.

Q. What I was trying to get was that very thing. Would you be good enough to tell us what your total income gross from that property was on November 10, 1942?

A. \$75.

Q. \$75 a month? A. Yes.

Q. That is gross? A. That's right. [103]

Q. And, of course, from that taxes and matters of that kind had to be deducted? A. That's right.

Q. In arriving at your conclusion with relation to the fair market value of this property, you have capitalized the income? A. What do you mean?

(Testimony of Carl A. Johnson)

Q. Well, you said something about 6 per cent, didn't you?
A. That is what Tavares told me.

Q. Well, how did you arrive at your \$8,000?

A. They arrived at it for me.

Q. Yes. So the value you have given to this jury and this court was a figure that Tavares gave you; is that right?
A. Correct.

Q. This property was about 1.02 acres; that is right, isn't it?
A. Yes.

Q. Are you familiar with that locality down there at National City?
A. Why, somewhat, yes.

Q. You have kept track of the land sales and what land was being sold for down there in 1942,—land like this?

A. No.

Q. Tell this court and jury whether you know of a [104] single parcel of 1.02 acres of land comparable and similar to this that was sold in the Village of National City, that was sold at any time before this for any such money as \$8,000. Do you know any, Mr. Johnson?

A. I am not in the real estate business.

Q. You don't know any, do you?
A. No.

Q. That is correct, isn't it?

A. No, I am not in the real estate business.

Q. Well, then, Mr. Johnson, just one more question, please. You don't know of any such sale, do you?

A. No.

Mr. Landrum: Thank you, sir. That is all.

Mr. Muir: May it please the court, may I inquire further on direct in regard to these leases?

The Court: Yes.

(Testimony of Carl A. Johnson)

Redirect Examination

By Mr. Muir:

Q. Mr. Johnson, you were asked about a lease with the Tavares Construction Company. I show you now a writing headed "Indenture of Lease Entered Into," according to the document on June 5, 1942, by and between Carl A. Johnson and Pearl Johnson, as lessors, as therein described, and the Tavares Construction Company, Inc., a California corporation, as lessee, and ask you if the signatures on the last page are [105] those of yourself and Mrs. Johnson. A. Yes.

Q. Did anyone for Tavares sign the same in your presence?

A. No, I don't believe so. They took it into another room, as I recollect it, to sign it.

The Court: Are these leases disputed, gentlemen?

Mr. Landrum: No, your Honor.

The Court: Then why don't you admit them and save a lot of time?

Mr. Muir: I would like to offer on behalf of the defendants Johnson the indenture of lease between Carl A. Johnson and Pearl Johnson with the Tavares Construction Company, dated June 5, 1942.

Secondly, an indenture of lease dated June 17, 1942, between Carl A. Johnson and Pearl Johnson, as lessors, and Carl G. Bliss.

Thirdly, an assignment of lease dated March 17, 1943, by Carl G. Bliss to the Defense Plant Corporation, assigning the Bliss lease.

The Court: What is the date of that?

Mr. Muir: March 17, 1943.

(Testimony of Carl A. Johnson)

Mr. Landrum: In that connection, if the court please, will counsel stipulate with me that the other lease was also assigned to the Defense Plant Corporation, an agency of the [106] government?

Mr. Muir: I have no knowledge, but if Mr. Martin states that they so did, why, I will so stipulate.

The Court: That is the Tavares lease?

Mr. Muir: Yes, your Honor.

The Clerk: Defendants' Exhibits A, B and C.

(The documents referred to were marked Defendants Johnson Exhibits A and B and C, and were received in evidence.)

[Defendants' Exhibits A, B and C—Leases pertaining to interests of defendants other than appellants. See originals.]

Mr. John M. Martin: If the court please, I have not been permitted to examine the exhibit that is offered, and I would have to see it before I could answer intelligently.

Mr. Landrum: All right. May I show it to him, your Honor?

The Court: Yes.

Mr. Landrum: If your Honor please, we don't seem to know definitely whether that was assigned to the government or not, so I will just go along without that.

Q. By Mr. Muir: Mr. Johnson, you moved from the location you had on Pacific Highway opposite the main entrance, the former main entrance of Consolidated. Can you tell us why you had to move out of that location?

A. Well, the Consolidated—

Mr. Landrum: Just a moment. That is objected to, if the court please. [107]

(Testimony of Carl A. Johnson)

Mr. Muir: I think it is preliminary to showing why he acquired this property.

The Court: Overruled.

The Witness: The Consolidated wanted the property, as I understood, and they kept insisting that they buy it, and, in fact, when they put the barricades down there they caused us a lot of trouble and, you know, the Army went in and put the barricades in, and it was very inconvenient. So, in fact, the National Guard, or the Army, or whoever it was that was there, notified us that they were going to condemn the property anyway as a hazard to the Consolidated Aircraft. Then I went to the Sunset Oil Company, and I knew of no other location—

Mr. Landrum: Just a moment. That is all objected to, if your Honor please.

The Court: Yes, sustained. I don't think the reasons in extenso are material.

Q. By Mr. Muir: You then moved your plant from the Pacific Highway location down to the National City area? A. No.

Q. Down to the Main Street area?

A. Yes, to the Main Street. I bought the plant from the Sunset Oil Company to move in there, and when Lester Bliss decided or he insisted he had to have the ground for the batch plant, why, we tried to arrange it to leave enough [108] for a bulk plant in the two vacant spots that were there, but after we went down and saw all the cement flying around, it wasn't suitable as a bulk plant, and we finally located on Main Street.

(Testimony of Carl A. Johnson)

Q. In other words, you contemplated putting your bulk plant to the south side on parcel 9 on each side of the ramp that is indicated there? A. That is right.

Q. Now, government counsel asked you the amount you were receiving from this property, and you stated you were receiving \$40 from the Tavares Construction Company on that lease? A. Yes.

Q. And \$35 from the Bliss lease?

A. That's right.

Q. A total of \$75 a month? A. That's right.

Mr. Muir: That is all.

Cross Examination

By Mr. Landrum:

Q. I just wanted to ask one question to make sure: Did the Bliss lease cover only the parcel we are here concerned with of 1.02 acres, or did it cover more land?

A. It covered the office space in the rear.

Q. So the answer is the Bliss lease covered more land [109] than we are concerned with here?

A. That's right.

Q. Did the Tavares lease cover more land than we are concerned with here? A. No.

Q. So you were getting \$40 a month for the land which we are here concerned with, and \$35 for this land we are here concerned with, together with some other land? A. That's right.

Mr. Landrum: Thank you, sir. That is all.

The Court: That is all.

(Witness excused.)

PAUL WARD,

called as a witness by and on behalf of the defendants Carl A. Johnson and Pearl Johnson, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: Will you state your name, please?

The Witness: Paul Ward, W-a-r-d.

By Mr. Muir:

Q. Please state your name. A. Paul Ward.

Q. What is your business, profession or occupation?

A. I am a State inheritance tax appraiser.

Q. For what State? [110]

A. The State of California.

Q. How long have you held that position?

A. Since 1929.

Q. You have an office in the City of San Diego, do you? A. Yes, sir.

Q. From 1929 you have been appraising property in connection with your official duties as such appraiser?

A. I have.

Q. Have you had any experience in appraising property, other than as a State inheritance tax appraiser?

A. Yes, I appraised property for private individuals. I am an appraiser for the Businessmen's Insurance Company of Kansas City, Missouri. I have appraised for the Superior Court. I have appraised in bankruptcy proceedings, and I have appraised considerably for private individuals.

Q. You have been making such appraisals ever since 1929 up until now? A. Yes, sir.

Q. You are on this date still an official State inheritance tax appraiser for the State of California?

A. Yes, sir.

(Testimony of Paul Ward)

Q. Can you tell us how many other such appraisers there are in San Diego?

A. There are three in San Diego County.

Q. That is yourself, Mr. Muller, and Mr. Hotchkiss? [111]

A. Yes, sir.

Q. You three are the official appraisers for the State of California in respect to inheritance tax matters for San Diego County?

A. Yes.

Q. Have you a license as a real estate broker?

A. Yes, sir, I am a licensed real estate broker; have been for about the past 30 years.

Q. In the year 1942, in connection with your official duties as an appraiser and as an appraiser for private interests, did you have an occasion to make any appraisals of property in the area in National City which has been more particularly described on Plaintiff's Exhibit 1, being in National City near Harrison Street, which is adjacent to the water front there, at about 15th Street intersecting with Harrison Street?

A. I have appraised property many times, mostly residence property, in that section. I have been past this property, of course, and I am very familiar with property in that section.

Q. Have you made any appraisals of industrial property in that area in the year 1942?

A. No, sir. It hasn't happened that in any estate I have had any industrial property that is comparable to this property, in my opinion. [112]

Q. In connection with your appraisals and official duties as State inheritance tax appraiser, are you familiar with industrial values in that area?

A. Yes, I am.

(Testimony of Paul Ward)

Q. Mr. Ward, are you familiar with the legal definition of what is known as the market value of land?

A. Yes.

Q. Would you state what you understand the reasonable market value term to mean?

A. The market value is the highest price, expressed in terms of money, which property will bring if exposed for sale on the open market, with a reasonable time to find a purchaser, buying with the full knowledge of all the uses and purposes for which the property is adapted and for which it is capable of being used.

Q. Now, I will call your attention to parcel 9, as indicated on Plaintiff's Exhibit 1, which is this portion (indicating), and ask you if you have made an appraisal of this property as of November 10, 1942?

A. Yes, sir.

Q. More particularly, have you made an appraisal of the fee title value of Carl A. Johnson and Pearl Johnson, as owners of this property?

A. Yes.

Q. What, in your opinion, is the reasonable market [113] value on November 10, 1942 of the land of the Johnsons, as indicated?

Mr. Landrum: That is objected to as no foundation laid.

The Court: Overruled.

The Witness: My value of the land, the market value of the land, is \$7,765.62.

Q. By Mr. Muir: Can you tell us how you arrived at this opinion of value?

A. I considered the property as industrial and commercial property, property suitable, most suitable, the highest and best use of the property being for industry,

(Testimony of Paul Ward)

industrial plants, warehouses or gas and oil depots, such as Mr. Johnson had the property used for. I considered property of this type on the market, the demand, the supply, the scarcity of comparable property the same as this, with the same features, the demand, and, in my opinion, in that comparison of other property I considered this property worth $17\frac{1}{2}$ cents a square foot. The property, the total area of the subject property, is 43,375 square feet, slightly over one acre, and by valuing it at $17\frac{1}{2}$ cents a square foot, it totaled a value of \$7,765.62 for the land.

Q. On this land did you make an appraisal of the corrugated iron building of approximately the dimension of 27 by 15 feet?

A. Yes, sir. In my opinion, the building was worth [114] on the day of taking, November 10, 1942, 75 cents a square foot, or the sum of \$300.

Q. Then, in your opinion, the market value of this property on the date of taking would amount to \$8,065.62; is that correct?

A. Yes, sir, that is the total appraised value.

Q. Now, in further arriving at your opinion of the reasonable market value, the fair market value of this property, on the date of taking, did you take into consideration the leases that the Johnsons had on this property with anyone?

A. Yes, sir, I considered the leases.

Q. More particularly, did you consider the lease between the Johnsons and the Tavares Construction Company?

A. Yes, sir, I gave most consideration to the lease there of \$40 a month.

Q. According to that lease, it appears that the lease was to run for a term of five years at a rental of \$40 a

(Testimony of Paul Ward)

month, a total rental in excess of \$4,000 from this lease. Can you tell us as an expert the computation of the value of land in comparison to the rental?

A. Yes, sir. In capitalizing upon the rental income of the property, the rent of \$40 a month, although there was a slight increase in a prorated portion of the Bliss rent, but basing our capitalization of the rental income on the [115] basis of \$40 a month, we would then have a total yearly rental of \$480. In checking the taxes, the prorate portion of the taxes on this subject property, it would amount to less than \$80, and I deducted the \$80 so as to cover it entirely, be sure to cover it, and took a net value of \$400 per year. Capitalizing on \$400 per year net gives a valuation of 20 times \$400 or \$8,000. In other words, 5 per cent net on \$8,000 gives the \$400 per year income.

Q. Also, in connection with your opinion of value, did you consider the fact that this property was adjacent, immediately adjacent to the water front?

A. Yes, sir. It is close to—at the date of taking it was close to the water front and what used to be the wharfage there of the National City wharf. I considered that, and I would like to add also that in consideration of this lease, while we are on it, that that was a very low lease. That is not the highest adequate return for the highest and best use of this property. This property, as I considered it, industrial and commercial property close to the water front and close to trackage, really would justify an income of \$75 a month. That \$75 is merely considered as a fair rental for the highest and best use. On that basis we would have \$900 a year income. We would have an expense of taxes, all taxes and all expenses of approximately \$80 a year, which would give us an

(Testimony of Paul Ward)

income of \$820 a month net—I mean, [116] \$820 a year net income. That income would have been a fair income for this kind of property, which showed 10 per cent on a valuation of \$8,200.

Q. Also, in arriving at your opinion of the value of this property on the date of taking, did you consider sales of land immediately adjacent, and in that immediate area?

A. I didn't have any sales of property adjacent or in that vicinity. I had to compare it with property of this nature in the location and section near the water front at the foot of Main, Sigsbee and Beardsley Streets, which is the section north of the A B C Brewery and down at the bay front, water front.

The Court: How far is that in lineal measurement from the site in question?

The Witness: Your Honor, that is quite a distance in miles. But I might add that a great many of the purchasers and people that needed property of this nature were forced to go to National City and go quite a distance south to get this kind of property, because at this time the property was not available in this section that I have just described, which is in the southwestern portion of San Diego.

The Court: Were the harbor facilities suitable for commerce in that immediate vicinity at the time of the taking?

The Witness: This property, the subject property, was [117] about the nearest they could get to the facilities, and so forth, that they really wanted, in the property that I am trying to compare it with; the facilities for trackage and nearness to the tidelands, although there was

(Testimony of Paul Ward)

very little use of this wharfage or this wharf at National City, but it was there. And also, the National City industrial concerns and automobile men that needed warehouses, and people of that classification, were really buying and wanted property in this location near to National City.

The Court: What was the water frontage of the subject property?

The Witness: Well, they had to cross over a block or two in order to get to the National City wharf, and to get to the tidelands, but the property had good trackage and good street frontage, Cleveland Street, and was in an industrial center, the National City industrial center.

The Court: Approximately how far would you say the property line of the subject property was at the date of taking from the ride line of the bay?

The Witness: My estimation on that distance would be approximately 100 yards.

Q. By Mr. Muir: Then in conclusion, your opinion of the value would be approximately the figure of \$8,000? It was a little more than that, but that figure would be a fair amount to state, that is \$8,000? [118]

A. Yes, sir. I think the fair market value is \$8,000.

Mr. Muir: That is all. You may cross-examine.

Cross-Examination

By Mr. Landrum:

Q. Mr. Ward, the parcel of land to which you have been referring is that parcel on Plaintiff's Exhibit 1 to which I am now pointing with this ruler, is it not? Will you step down? Have you seen this?

A. That is the property, yes, sir. Just let me have a good look at that map.

(Testimony of Paul Ward)

The Court: That map does not purport to be drawn to scale, does it?

Mr. Landrum: I think it is to scale, your Honor.

The Court: Is there a legend on it?

Mr. Landrum: Sir?

The Court: Is there a legend on it?

Mr. Landrum: No, your Honor, there isn't.

The Witness: You are speaking of the red portion, of the property here (indicating)?

Q. By Mr. Landrum: Yes. That is it, isn't it?

A. Yes, sir.

Q. Did you value that as water front property?

A. No, sir, I valued that property as industrial and commercial property. [119]

Q. As a matter of fact, Mr. Ward, what was right in here on this map (indicating), do you know?

A. Yes, sir. Santa Fe lands, Santa Fe terminal lands.

Q. Was there a street in there?

A. There was Harrison—pardon me. Will you point to the location again?

Q. I am not so familiar with this map. You point out where that street is, will you?

A. Harrison Street runs just to the west of this property. This is north up here, this is east. Harrison Street is the street right in here (indicating), and that is the street. Although it was used only for track or trackage, still it is the street in there, and the Santa Fe comes just to the west of the spur trackage.

Q. Yes, sir. That is what I was trying to get at. As a matter of fact, this land is not adjacent to the water

(Testimony of Paul Ward)

front, but it is across the street, and then all this land is between it and the water front, isn't it?

A. Not at the date of taking, the tideland was not far from the—not far west from the Santa Fe main line.

Mr. Landrum: Yes, sir. Could I have that exhibit, please, the lease?

(The document was handed to counsel.)

Q. By Mr. Landrum: In arriving at your conclusion with relation to the fair market value of this property, did you [120] take into consideration the leases which were upon it?

A. Yes, sir, I took the leases, and I also took what I considered would be a fair lease for a fair rental for property of this nature.

Q. Did you say that the Tavares lease was only a five-year lease?

A. I did not have the exact time and date. I used only the amounts on the Tavares lease, at \$40 per month.

Q. In arriving at your conclusion by the method of capitalization of income, do you not think it would be rather important for you to know how long that income might be derived?

A. Well, it couldn't last longer than at the date of taking, but I based it on \$40 a month anyway.

Q. For how long? For how long?

A. For the length of the Tavares lease.

Q. What was the length of the Tavares lease?

A. I could not answer that question, sir.

Q. Mr. Ward, if you don't know how long the lease was and you say that you based it on the length of the lease, would you tell us again just how you figured it?

(Testimony of Paul Ward)

A. I used that only as a factor, but my main contention or my main capitalization of income, which I think is important in fairness, is what is the property's highest and best use and what property income would this property bring. [121]

Q. Then you are not basing it on capitalization of income; you are basing it on what the income should be. That is what you say, isn't it? [122]

A. I gave my testimony both. I didn't want to be confused.

Q. I noticed, however, that, when you found these actual figures of \$480 a year, you used 5 per cent?

A. Yes, sir.

Q. But, when you took another figure, you used 10 per cent. Now, tell us isn't it a fact that the risk in property of this kind actually should require a capitalization at 10 per cent rather than 5?

A. No, sir; not when it is being used such as a batching plant or such as the Tavares used it for, which is not a true, fair income on the property.

Q. I want to show you the Tavares lease. As a matter of fact, that lease runs for about 20 years, doesn't it, with its extensions?

A. I did understand that there was an option, it is true, on the property, on the lease.

Q. Now, then, Mr. Ward, in arriving at your conclusion from the method of capitalization, or what we call the economic approach, you figured that land was going to be rented continuously at this rate of income forever, didn't you?

A. No, sir; not at the \$40 a month income.

(Testimony of Paul Ward)

Q. Well, tell us exactly how you capitalized that. How did you arrive at any such figure as you have given us by a [123] capitalization of \$480 a year?

A. My capitalization of \$480 a year is on the basis of the \$40 a month, which was the Tavares rental. I also capitalized it and considered it for my own valuation, which I think is fair, of what would be and should be considered as a fair rental on the highest and best use for that land.

Q. Now, Mr. Ward, when you use that method of economic approach, it is necessary for you to reduce that income which you may receive in the future to its present worth, is it not?

A. Not in the assumption as to using it as a factor for a valuation.

Q. As a matter of fact, if that is a 20-year lease, 20 years from the date of it—

Mr. Muir: May it please your Honor, I think that is a misstatement of the terms of the lease. It is a five-year lease.

Mr. Landrum: I will be very happy, your Honor, to try to find out what it is.

Q. I call your attention, Mr. Ward, to paragraph 2. Does it not read, "The term of this lease shall commence on the 5th day of June, 1942, and it shall extend for a term of five years, ending the 4th day of June, 1947, with the option hereby granted for an additional term of five years. This lease shall automatically be renewed at the expiration of the original five years of the lease at least 90 days be- [124] fore the expiration prior to the termination of the lease the corporation shall notify the lessor, in writing, by registered mail, that it does not

(Testimony of Paul Ward)

intend to extend the lease." As I understand, it is a five-year lease, with a five-year renewal clause, is it not?

The Court: It speaks for itself.

Mr. Landrum: Yes, sir.

Q. Then, you say that 10 years from that date, he will receive \$40 a month, or \$480 the 10th year? That is right, isn't it, Mr. Ward?

The Court: Just a moment. Are you going to do the testifying?

Mr. Landrum: No, your Honor.

The Court: And the witness didn't answer audibly. He shook his head.

Mr. Landrum: What is the answer?

The Witness: My answer is that five or 10 years on that lease, or the option of five years, should be considered as a procedure in valuing the land, and I considered it and gave the figure on that basis.

Q. By Mr. Landrum; And, in order for you to arrive at that figure, you had to conclude that 10 years from now under that lease he would get an income of \$480, didn't you?

A. That is the basis I took; yes, sir.

Q. Now, if you are going to get \$480 10 years from now, [125] what is that \$480 worth today, if you take it and invest it in something else?

Mr. Muir: I object to that as argumentative, your Honor.

The Court: Yes; I think it is. Sustained.

Mr. Landrum: I beg your Honor's pardon.

Q. I understood you to say, in your opinion, this was industrial property.

(Testimony of Paul Ward)

The Court: Mr. Ward, answer audibly so that the reporter can understand you.

The Witness: Yes, sir; industrial and commercial.

Q. By Mr. Landrum: Will you tell us whether or not in your investigation you were able to find a sale of a single piece of industrial property, in the city of National City, where it was sold for as much as even \$3,000 an acre, in the city of National City?

A. I haven't any sale as of the date of death—I mean as of the date of taking.

Q. You are correct. I asked you in the city of National City. You referred to a sale here in the city of San Diego, didn't you? Did you find a single sale in the city of National City for as much as \$2,000 an acre, please, sir?

A. I haven't any sale, as I testified, in National City, of comparable property. [126]

Q. Did you find a single sale in the city of National City for as much as \$1,500 an acre?

Mr. Muir: I think that is argumentative. He stated he has no sale. Therefore, it is a repetition of counsel's question.

The Court: Probably it is. You have got to allow for the zeal of counsel, however.

Mr. Muir: Yes, sir; thank you.

Q. By Mr. Landrum: Did you make an allowance for the fact that the government of the United States was the owner, by assignment, of this lease? Did you know that the government owned this and had a 10-year lease on this property?

A. In my valuation, it was not considered.

(Testimony of Paul Ward)

Q. Don't you think that a buyer willing but not compelled to buy, discussing the matter with a seller willing but not compelled to sell—that he would say to the seller, "Mr. Seller, you have got a lease on this for 10 years, have you not?" Don't you think they would talk about that?

A. As a broker, if I have a buyer and I could put the testimony in—a buyer that would—

Q. That isn't what I asked you—

The Court: Now, we don't permit counsel to interrupt a witness. Don't interrupt the witness. I don't want that from any counsel in the case. [127]

Mr. Landrum: Thank you. That is all.

Mr. Muir: May I inquire further, your Honor?

The Court: Yes.

Redirect Examination

By Mr. Muir:

Q. Mr. Ward, you were asked by government counsel about the economic theory of capitalization. Does it make any difference whether a lease is to run from one to 20 years in arriving at your capitalization?

A. Not in my considering it as a factor in arriving at my valuation.

Q. Secondly, you were asked in regard to the rental running for 10 years. Can you tell us the period of time when rental will equal or should equal, according to proper capitalization, the value of the land? In other words, if property is rented for a continuous period, how long would that period have to be at a certain rental to reach the point

(Testimony of Paul Ward)

where it would equal, that is, in gross receipts of rental, the fair market value of the land?

A. It would be the length of time to arrive at my valuation, that I arrived at, if I understand the question. But, of course, if I was using that method, I would then take the present value of that money, of that rental, which I have in my office the tables of for that purpose.

Mr. Muir: That is all. [128]

We will call Mr. Haas.

RICHARD G. HAAS

called as a witness by and on behalf of the defendants Carl Johnson and Pearl Johnson, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Richard G. Haas.

Direct Examination

By Mr. Muir:

Q. Please state your name.

A. Richard G. Haas.

Q. What is your residence address?

A. La Mesa.

Q. What is your business or occupation or profession? A. Automobile business in National City.

Q. How long have you resided in San Diego County?

A. Seven years.

Q. In 1942, were you in business in National City?

A. Yes.

Q. In 1942, were you then interested in buying land?

A. Yes; I was.

Q. I direct your attention to Plaintiff's Exhibit 1 and call your attention particularly to Parcel 9, which is the

(Testimony of Richard G. Haas)

property of Carl Johnson and his wife, Pearl Johnson, and ask you if, in 1942, you were interested in buying that par- [129] ticular parcel of land.

Mr. Landrum: That is objected to, if the court please.

The Court: Sustained. You didn't state the grounds of your objection. You should do so in this jurisdiction.

Mr. Landrum: I was trying to keep from arguing the objection, your Honor.

The Court: No; that isn't arguing the objection. I won't permit argument but I do want a statement of the reasons counsel has for objecting to a question. Otherwise, the record doesn't show what the objection is. That question is not proper on direct examination. The question doesn't disclose what you expect to elicit.

Q. By Mr. Muir: In 1942, Mr. Haas, did you make an offer to Mr. Johnson for the purchase of Parcel 9?

Mr. Landrum: That is objected to as incompetent, irrelevant and immaterial, an offer.

The Court: Sustained.

Q. By Mr. Muir: Were you, in 1942, ready, able and willing, to buy Parcel 9?

Mr. Landrum: That is objected to upon the same grounds, if your Honor please.

The Court: Of course, that incorporates features that may or may not be within the rule as to a willing buyer and a willing purchaser. There is nothing in the question that tells the reasons why he was in the market. [130]

Mr. Landrum: The question was whether he had the money to buy it.

The Court: I told you not to argue objections. The first opportunity, you overstepped. The ruling will stand.

(Testimony of Richard G. Haas)

Q. By Mr. Muir: Mr. Haas, were you interested in this Parcel 9, in 1942, for your own acquisition?

A. Yes.

Mr. Landrum: That is objected to. That is immaterial, if your Honor please.

The Court: Overruled.

Q. By Mr. Muir: Could you tell us for what purpose you desired the land?

A. At that time I was entering into the trucking business or construction business and I needed that type of property as headquarters for storing equipment.

Q. Did you at that time understand that Mr. Johnson and his wife also owned the portion to the south up to 15th Street? A. I did.

Q. That is a parcel of land consisting of about two acres? A. That is right; and I later bought that.

Q. You bought the southern half of his parcel of land?

A. Yes, sir; that is right.

Q. In other words, all that portion to the south up to [131] 15th Street, south of the portion indicated as Parcel 9, you are now the owner of?

A. That is right.

Q. From whom did you acquire it?

A. I bought it from Johnson and Mrs. Johnson.

Q. How much did you pay for it?

Mr. Landrum: That is objected to, if the court please. It is indefinite as to time.

The Court: Sustained for that reason.

Q. By Mr. Muir: When did you buy this property, Mr. Haas? A. In November, 1944.

Q. What was the price you paid?

(Testimony of Richard G. Haas)

Mr. Landrum: That is objected to, if the court please. It is too remote.

The Court: Sustained.

Q. By Mr. Muir: In 1942, did you offer to buy this property from Mr. Johnson and his wife?

Mr. Landrum: That is objected to as indefinite as to time and immaterial.

The Court: Sustained.

Q. By Mr. Muir: Did you at any time in 1942 offer Mr. Johnson to buy his property, that is, all of the southern portion that you purchased later in 1944?

A. I did. [132]

Q. Was that on or about November 10, 1942, or previous thereto? A. It was about that time.

Q. At that time can you state what you offered Mr. Johnson for the property?

Mr. Landrum: That is objected to, if the court please, as immaterial and incompetent.

The Court: Will you read the question?

(Question read by the reporter.)

The Court: You say it was about that time, Mr. Haas. Can you give the time a little more definitely with respect to that date, November 10, 1942?

The Witness: I would say that it was somewhere before November 10th; probably July or August.

The Court: The objection is overruled. You may answer the question. Will you read the question?

(Question read by the reporter.)

Mr. Landrum: I renew the objection, if your Honor please, on the ground it is incompetent and another parcel of land.

The Court: The objection is overruled.

(Testimony of Richard G. Haas)

The Witness: I offered Mr. Johnson \$7,000 for the property, and at that time I didn't buy the property but I leased it from that period to November, 1944, at which time I paid him \$7,000. [133]

Q. By Mr. Muir: At the time you indicated in 1942, were you then able to pay the consideration of \$7,000?

A. I was.

Q. At or about that time, did you offer Mr. Johnson to buy Parcel 9, which is the portion to the north of the part you did buy?

A. We talked about that. But at that time I talked to him about buying the southern part. I talked to him about the north portion with the south portion and, when I purchased the south portion, I took an option from Mr. Johnson on the north portion when and if it was returned to him from the present occupants, at a price—

Mr. Landrum: Just a moment. If the court please, that is objected to.

The Court: Overruled.

Q. By Mr. Muir: At the time you purchased the southern half of the total property then owned by Mr. Johnson and his wife, did you then offer to buy the north half? A. I did.

Q. Can you state how much you offered at that time?

Mr. Landrum: That is objected to, if the court please, as incompetent.

The Court: Sustained.

Mr. Muir: That is all. You may examine.

Mr. Landrum: Nothing further. No cross examination. [134]

Mr. Muir: The Johnsons rest, your Honor.

The Court: Ladies and gentlemen, we will take a recess for a few minutes. Remember the admonition which I gave you yesterday and keep its terms inviolate. I wish you would occupy the jury room, ladies and gentlemen. It is for your convenience and it is better than circulating in the halls.

(Short recess.)

The Court: Let the record show all are present. Proceed.

Mr. Monroe: Is the National City case next, your Honor?

The Court: Very well. It is immaterial to me whether you or Mr. Sloane proceed but, if you have agreed among yourselves, you may proceed.

Mr. Monroe: May it please the court, and you members of the jury, together with Mr. Ratelle and Messrs. Campbell and Campbell, we represent National City. The lands which are involved in this action comprise something a little short of a hundred acres, a matter of, I think, 96 and a fraction acres, covering this area, with the exception of this little triangular piece marked as "4," with which we are not concerned in this action. These lands are what are ordinarily referred to as tidelands, lands which originally were owned by the State of California and which, by acts of the Legislature from time to time, have been vested in various California cities, as the tidelands were vested in San Diego. [135] The tidelands, by act of Legislature, were vested in National City for public purposes, navigation, commerce and fishing, which lands, as they were held by the cities, are subject to being leased for certain purposes while in the control of the cities, and not subject to sale to private individuals. I mention that feature as indicating, as it will later, some little difficulty

that will have to be met in the course of testimony in determining the market value.

In this action these lands, which comprise not only the shore but the tidelands running out into and including the submerged lands up to the bulk head line, are taken by the United States in this proceeding. They become the property of the United States.

The only subject with which you and I are concerned in the course of this trial is the amount to be awarded to National City as compensation, or, as it is put in the statute, just compensation, for the taking of these lands owned by the city.

The law furnishes us in a case of this kind with a test. Reference has been made to that test in the testimony that has already gone before you. The law considers that just compensation is what is considered as the fair market value of the property. In other words, what can you reasonably sell it for as of the date of taking, and that date will be fixed for you by the court as we proceed. And so we find [136] ourselves faced by the necessity in this case of proving what is the fair market value of this tract of land, which includes the entire contiguous area and includes the portion of the land which is the submerged land running out to the bulk head line.

Obviously, in arriving at that assumption, we have to make several assumptions. We have to assume the sale value of land which, prior to the time of the date of taking, could not be sold. It is our purpose merely in this action, in so far as the evidence introduced before you is concerned, to endeavor to show what we believe is the fair value of that land.

We believe that the overall value of the property taken from National City, taking into consideration its peculiar

uses and taking into consideration all of the facts concerned with this tideland, and that the entire tideland all around the Bay of San Diego is now occupied, and that it will fairly develop, is worth an over-all price of approximately \$10,000 per acre. We will introduce evidence to that effect. I thank you. Mr. Eisenman, will you come forward, please?

T. W. EISENMAN

called as a witness by and on behalf of the defendant National City, having been first duly sworn, was examined and testified as follows:

The Clerk: Please state your name. [137]

The Witness: T. W. Eisenman.

Direct Examination

By Mr. Monroe:

Q. Won't you please state your name for the jury?

A. T. W. Eisenman.

Q. Where do you live, Mr. Eisenman?

A. I live in Chula Vista.

Q. What is your business or profession?

A. My business is an engineer.

Q. Just briefly give us your experience in that business, Mr. Eisenman.

A. Well, I spent practically my entire life in the profession. The last 10 or 12 years has been in connection with the construction industry.

The Court: Mr. Eisenman, will you raise your voice a little, please, so we can hear you?

The Witness: In the last 10 years, my endeavors have been in connection with the construction industry. Prior to that, I was associated with land surveys and other phases of the engineer profession.

(Testimony of T. W. Eisenman)

Q. By Mr. Monroe: By whom are you employed?

A. At the present time I am employed by Concrete Ship Constructors.

Q. And how long have you been associated with that organization? [138]

A. Since December, 1941.

Q. And that organization generally consists of what various entities?

A. The Tavares Construction Company, Elliot, Stroud-Seabrook and C. M. Elliot.

Q. What generally have been your duties in connection with your service to that company?

A. Well, among my duties, one has been the construction of the shipyard proper, the overseeing of the work and providing the estimates and seeing that sufficient money was available for the construction and the problems in connection with the land.

Q. In connection with your duties, you have become familiar with what we call the subject property, the property that is being taken in this action?

A. Yes; I am familiar with it.

Q. I have particularly in mind in the questions I will ask you concerning the property the property which is designated in this suit as Area A and also property that is designated as Parcels 1 to 8 inclusive, except for the parcel known as Parcel 4. Now, are you generally familiar with that bunch of land?

A. I am.

Q. And do those parcels form a contiguous area?

A. Yes; they do. [139]

The Court: Mr. Monroe, are you going into Parcels 10 and 11?

Mr. Monroe: No, sir. We are not interested in that. In that connection, your Honor, I am making this inquiry

(Testimony of T. W. Eisenman)

at this time in the hope of saving time. There has been certain general testimony that has been offered by the other parties to this action. May it be considered that any testimony, of a general nature, that has been offered, we may adopt in so far as applicable to our case, without the necessity of again proving the same thing?

Mr. Landrum: There is no objection to that, your Honor.

Mr. John M. Martin: So stipulated and understood on behalf of my clients.

Mr. Muir: So stipulated, your Honor.

Mr. Sloane: So stipulated on behalf of the San Francisco Bridge Company.

The Court: So ordered as to all.

Q. By Mr. Monroe: I want to show you first, Mr. Eisenman, a map purporting to be a geological map of San Diego Bay, and upon which there has been marked, in pencil, or in pen, the words "Subject Properties," with an arrow pointing. I will ask you whether or not that map correctly shows the general location of the area that we are talking about.

A. Well, generally, yes. But the property happens to be somewhat south of where the arrow is pointing. [140]

Q. Let's mark that, if you will, please. Let me hand you something to mark it on.

The Court: Mark it on the bench, if you wish.

Q. By Mr. Monroe: With a pen here, will you correct or sort of designate, so it will be plain, where, in your opinion, the subject properties lie?

A. I am marking the north line of the property, which is approximately west of 13th Street of National City, and the south line of the property, which is approximately

(Testimony of T. W. Eisenman)

west of 19th Street, National City. Then the bulk head line runs out approximately a thousand feet, or 1,500 feet, rather, from the mean high tide line as shown on this map.

The Court: You have put a cross on the rectangles of the diagram?

The Witness: Yes, sir.

Mr. Monroe: I will offer the map as National City's exhibit.

Mr. Landrum: No objection.

The Court: So ordered.

(The map referred to was received in evidence and marked defendant National City's Exhibit No. D.)

[Defendants' Exhibit D—Map. See original.]

Mr. Monroe: And might I at this time show it to the jury, so that they may get the general location before we proceed?

Mr. Landrum: It hasn't been marked as an exhibit, your [141] Honor.

The Court: It may be marked now and you may show it to the jury.

The Clerk: Defendant's Exhibit D.

(Map exhibited to jury.)

The Court: Apparently, the jury has inspected the map.

Q. By Mr. Monroe: Mr. Eisenman, I will show you another map, which shows a colored area and also shows adjacent streets, railroad yards and whatnot, and I will ask you if, in your opinion, that is a correct map of the subject area, showing the adjacent streets and blocks.

A. It correctly shows the surrounding country. It doesn't display Parcel A, as I understand it. Parcel A, as

(Testimony of T. W. Eisenman)

I understand it, goes westerly from this point here rather than down to this point.

Q. In other words, you have pointed to a line north of that area, other than the area in question?

A. Yes.

Q. Suppose, then, that we mark the northerly boundary of the subject property.

A. In marking this, it is only approximate because I don't know the scale of this.

Mr. Monroe: I am just offering it for approximate location.

The Witness: This doesn't seem to do the work. I will put an "X" in the yellow portion of this map that does not [142] apply to Parcel A, as I understand it.

Q. By Mr. Monroe: So that the area, the subject area, is all south of the line that you have marked and the "X" that you have marked in red pencil?

A. That is correct.

Mr. Monroe: We will offer this map as the National City's next exhibit. I believe it is large enough so that we can just put it on the board, your Honor.

Mr. Landrum: No objection, your Honor, but I would like to have it marked and numbered so that I can keep my record. Is that Defendant's Exhibit 2?

The Clerk: Defendant's Exhibit E.

The Court: Is that lettering satisfactory, gentlemen?

Mr. Landrum: That is all right.

The Court: So ordered. [143]

[Defendants' Exhibit E—Map. See original.]

(Testimony of T. W. Eisenman)

Q. By Mr. Monroe: I will hand you, Mr. Eisenman, another map which has been shown counsel, and which I wish you would just explain to the court what it is.

A. This plat was prepared at my direction, at the instruction of Judge Haynes in the State Court, to be used in connection with a rent suit. It shows the property in the various areas, wharf footage, and so on, and the date of the initial use of the various parcels.

Q. Now, the area which would be marked on the government's exhibit as A appears on the map with a lot of numbers. Will you explain what those numbers are?

A. Well, if I understand what you mean, you are referring to the soundings.

Q. All these numbers on here (indicating).

A. The numbers that are shown in parcel A here are the soundings, that is, the depth of water at mean low low tide, or, as we normally refer to it, as the depth of water below the datum point, and these soundings were taken prior to the dredging that was performed by the Tavares Construction Company.

I would say the soundings were, oh, probably started in December of 1941 and completed sometime in the early spring of 1942, or prior to the dredging that was accomplished by Tavares Construction Company for the shipyard use.

Q. Now, let me ask in that connection: you have used [144] the term "mean low low tide," which perhaps the jury understands, but I don't. Will you explain that, please?

A. Well, that is the average of the low tides. Every day or twice a day you have a low tide, and the average of that low tide is known as the mean low low tide, and

(Testimony of T. W. Eisenman)

that point is used by the engineers and the Coast Geodetic Survey for the datum point or the basis for all your elevations to be taken from.

Q. Did you have to do with the making of those soundings?

A. Yes, these soundings were made under my direction.

Q. As the soundings were made, are they correctly depicted in those figures on the map?

A. Yes, they are.

Mr. Landrum: Your Honor please, we are perfectly willing to stipulate the map in evidence. If it depicts conditions in 1941 and early 1942, there is no objection to it, your Honor.

The Court: Mark it as an exhibit.

The Clerk: Exhibit F, your Honor.

The Court: Exhibit F.

(The document referred to was marked as Defendant National City's Exhibit F, and was received in evidence.)

[Defendants' Exhibit F—Map. See original.]

Q. By Mr. Monroe: Those correctly show the various [145] dates of the commencement of the construction of the things that are indicated on the map?

A. Yes, they do.

Mr. Monroe: We will offer it as National City's next exhibit.

Mr. Landrum: It is stipulated in, your Honor.

The Court: So ordered.

The Clerk: That is Exhibit F.

Mr. Monroe: I think perhaps we will wait to show that to the jury until a little later time. There will be

(Testimony of T. W. Eisenman)

other evidence that will refer to this map and make it perhaps a little more clear.

The Court: Very well.

Q. By Mr. Monroe: This map which I hold in my hand is a photostat, is it not? A. Yes.

Q. And that is of a larger map?

A. Yes, it is of a much larger map.

Q. So that when the scale is shown on the map, that scale would not—

A. It would not apply to the map.

Q. It would not apply to the exhibit, as it shows here?

A. That is right.

Q. But would only be proportionate? [146]

A. That is right.

Q. Thank you. Mr. Eisenman, I wonder if you could very briefly give us a little idea as to what the situation was on this property, taking as a date, for example, November 10, 1942? What was the situation as to what the property was then being used for?

A. On November 10, 1942, as I recall, the shipyard proper was approximately 80 per cent complete; that is, the development for the shipyard was approximately 80 per cent complete, and the yard was actively busy in constructing concrete ships for the United States Maritime Commission.

Q. Now, that area was then being occupied by the Concrete Ship Constructors? A. That is correct.

Q. What, generally, was their business?

A. Shipbuilders.

Q. What sort of ships were they building?

A. Concrete ships.

(Testimony of T. W. Eisenman)

Q. Can you give us something of an idea as to how long it took to turn out a ship?

A. Well, the first one took quite a while. The keel was laid on May 30, 1942, and was launched October 13, 1942. Then as we went along the time of construction was greatly reduced, so we built one ship in a week from the date of keel-laying to launching. Generally speaking, I would say that it [147] took around 100 days to build a ship.

Q. Now, calling attention again to the date of November 10, 1942, was there any ship launched close to that date?

A. Well, the first ship was launched the 13th of October. I imagine the second ship was launched very close in there, but I don't recall—

Q. How about November 11th, Armistice Day?

A. I believe that is correct.

Q. Do you have some photographs taken on the occasion of the launching of the ship on November 11, 1942?

A. Yes, I have.

Q. Are those available?

A. Yes, they are over in one of the other offices. I could get them for you, if you want them.

Q. Suppose we proceed with something else, and we can get those so that we can have them immediately after the noon recess.

Well, they tell me they are right across the hall and you could get them in just a minute?

A. Yes, they are in the judge's chambers.

The Court: I think we permitted them to occupy one of these rooms. Can you get them?

The Witness: I can.

(Testimony of T. W. Eisenman)

Q. By Mr. Monroe: Could you also bring that big panorama? Have you got that? [148] A. Yes.

The Court: You gentlemen had better confer on that. I want to know whether you are agreed on it.

Mr. Landrum: Yes, your Honor.

The Court: Tell the bailiff not to bring the diagram in until I tell him to do so, to just bring the photographs.

Mr. John M. Martin: That is all you asked for.

Mr. Monroe: I asked for a large panorama photograph.

The Court: Only for the panorama photograph?

Mr. Monroe: That is correct.

The Court: Will you come up here, gentlemen, please?

(Thereupon the following proceedings were had between court and counsel, outside the hearing of the jury:)

Mr. Landrum: The government will object to the introduction in evidence and to the exhibiting to the jury of a photograph of something the government was doing on the premises in 1942, in that the land which we are to pay them for is bare land, and a photograph showing the launching of a ship, or, in other words, what the government did at that date is not proper here.

The Court: Is there any dispute between you as to the time when the photograph was taken?

Mr. Landrum: No, I will not dispute that, but I do not think it is proper to show what the government was doing on the premises. [149]

The Court: It may be as to parcel A, there may be some features there that are relevant in the court's view of the case. It is true as to the other parcels it would not be quite informative, but that could be covered by an instruction, I believe.

(Testimony of T. W. Eisenman)

Mr. Landrum: Parcel A, your Honor, is the water. You understand that it is the water parcel?

The Court: You mean the submerged land?

Mr. Landrum: Yes.

The Court: You have to have submerged land in order to have a harbor, and the proximity to a harbor determines the value of the adjacent portions of land.

Mr. Monroe: Here are the pictures, your Honor.

Mr. Landrum: We feel that pictures showing what the government has done is entirely improper to show the value of a bare piece of land. That is what National City has.

Mr. Monroe: Those bundles are all the same, your Honor. There are three photographs.

The Court: I think it gives the jury some idea as to what was there on the day of taking. In other words, it is simply a pictorialization of something the witness would testify to. What is the difference?

Mr. Whelan: As I understood yesterday, your Honor, there was no claim being made that the government should pay for the cost of improvements to the land itself. I understood [150] that was Mr. Monroe's point, that he did not assume and he was not going to contend that the government would have to pay for the cost of improving the land, that had already been done.

Mr. Monroe: That is correct.

The Court: I am not speaking as to the value of the property concerning which the date, November 10, 1942, is applicable. I am speaking as to the value of parcel A, which was not taken on November 10, 1942, so far as the evidence at this time is concerned.

(Testimony of T. W. Eisenman)

Mr. Landrum: If your Honor please, I had suggested to counsel that on this exhibit which he has just introduced, which is this map, there is depicted the actual physical disturbance of these different parcels of land. That is an exhibit in this case right now, and I asked counsel to present that orally at this time, in order that we might understand just exactly when this man was in charge and they actually did interfere with the occupancy of that land. I thought that would clear up our question immediately. He did not do that, but that exhibit is in evidence. My thought is only this, your Honor, that what the government did on this land, any improvement that the government itself made upon it, cannot be claimed by the landowners in this law suit.

The Court: That is true.

Mr. Landrum: Yes. Now, they have a picture there [151] showing a beautiful shipyard in operation. That is my objection to it. This shows it with hundreds of thousands of dollars already spent on it by the government.

The Court: It shows the conditions that existed on the terrain on the date in question, does it not?

Mr. Landrum: Yes, it does, your Honor.

The Court: Then you can cross-examine on that.

Mr. Landrum: Well, I will not take up time on it now.

The Court: When it is shown to the jury, you can show as to what you did. But to exclude a pictorialization as to something that would be narrated by the witness,—

Mr. Whelan: Isn't it clear, may it please the court, that there had been a great amount of leveling done, \$100,000 worth of leveling work, and isn't it clear, rather, that it shall be considered as of the date of the valuation

(Testimony of T. W. Eisenman)

as it existed prior to the time that the government put in the improvements.

The Court: No, it is the condition of the area on the date of taking, whatever it is. If it is beneficial, it is beneficial. If it is detrimental, it is detrimental. But it is a proper matter for the jury to consider.

Mr. Whelan: And it would show the \$100,000 worth of leveling. I believe that is the amount.

The Court: It would show anything which the photographs depict, and you can cross-examine on that. [152]

Proceed, gentlemen.

(Thereupon the proceedings were resumed within the hearing of the jury:)

The Court: As to these photographs, Mr. Eisenman, were you present at the time the pictures were taken?

The Witness: I either took them myself, or one of the men took them. I took a great many of the photographs; probably half of them that were taken in the progress of the work.

Q. By Mr. Monroe: I will hand you first one of the photographs that you have produced, and ask you what that is.

A. This is a photograph of the launching of Concrete No. 2, which was the second concrete vessel to be launched in the past war. This picture was taken on November 11, 1942.

Mr. Monroe: We will offer the photograph in evidence as National City's next exhibit.

(Testimony of T. W. Eisenman)

The Court: So ordered.

The Clerk: That will be Exhibit G.

Mr. Landrum: Exhibit G is objected to, if the court please, upon the ground and for the reason that it is incompetent, irrelevant and immaterial, it being the position of the government that it depicts conditions as they existed on November 11th, but in a changed condition, which has been brought about by the government's expenditures upon this [153] property.

The Court: But it is conceded that it does depict and pictorialize the conditions on that date?

Mr. Landrum: Yes, your Honor.

The Court: The objection is overruled.

(The document referred to was marked Defendant National City's Exhibit G, and was received in evidence.)

[Defendants' Exhibit G—Photograph of shipyard or portion thereof. See original.]

The Court: You will bear in mind, ladies and gentlemen, in considering the effect of these pictures. You will interpret the pictures not only by the picture itself, but by the evidence that is elicited showing the various stages of work and the development that took place at the point indicated by the picture and in the surrounding terrain at that time.

Q. By Mr. Monroe: Now, I will hand you another picture—

The Court: Just a moment. (Continuing) —the surrounding terrain and surrounding submerged portions that will be shown by the picture. I think I should further state there is one parcel here, ladies and gentlemen, known

(Testimony of T. W. Eisenman)

and described as parcel A, which I understand it is agreed by all counsel consisted of submerged lands, that is to say, they were submerged and subject to the ebb and flow of tides at that time. Is that not correct, gentlemen? [154]

Mr. Landrum: As I understand it, that is correct.

Mr. Monroe: That is correct.

The Court: The other parcels are not in the same topographical and nautical situation. Proceed.

Q. By Mr. Monroe: I will hand you another photograph which you have produced, and ask you what that is.

A. This is a photograph showing the construction of a dry dock or, more precisely, a wet dock. It happens to be the third wet dock that was built at this yard, and, also, it shows the construction of the gantry runways, and by that I mean the tracks that carry the large gantry cranes. This picture was taken November 17, 1942. It also shows the dredging operation in the so-called area A. You will note it right ahead of the wet dock.

Q. Now, what is the number of that dock?

A. 3.

Q. That is the one which is shown as Dock No. 3 upon the map that has been introduced in evidence?

A. Yes, Dock No. 3.

Mr. Monroe: We will offer that as National City's next exhibit in evidence.

Mr. Landrum: Do you offer that?

Mr. Monroe: Yes.

Mr. Landrum: Exhibit H is objected to, if your Honor please, upon the ground and for the reason that it shows the [155] land in a condition as having been changed by the operations of the government. It is conceded that it

(Testimony of T. W. Eisenman)

depicts conditions as of this date, but that the land has been changed.

The Court: Is there any question but that is what it does show, Mr. Monroe?

Mr. Monroe: That is correct. It shows what the conditions were on the date of the taking of the picture.

The Court: And some of those conditions were the result of government work?

Mr. Landrum: That is our position.

Mr. Monroe: Well, that, of course, I am unable to say, what was done with the concrete shipyard by the Tavares Company, and what may have happened from there. That I don't know. That I am not familiar with. I am showing this as the condition, and particularly as addressed to the utility of the property.

The Court: The same order will be made, ladies and gentlemen. What I want to impress on you is this, not to take the picture just on its face value, but to use the picture in connection with the other testimony that will be received in the case as to what occurred at certain times.

The Clerk: Exhibit H in evidence.

(The document referred to was marked Defendant National City's Exhibit H, and was received in evidence.) [156]

[Defendants' Exhibit H—Photograph of shipyard or portion thereof. See original.]

(Testimony of T. W. Eisenman)

Q. By Mr. Monroe: Now, what was the date of this next picture?

A. This picture is November 20, 1942.

Q. It shows what?

A. It is a picture looking north from the sand mold, showing the landing dock that was built, I understand, by the San Francisco Bridge Company. This dock is in the immediate background, and in the background you can see the construction of the shipyards proper.

Q. Now, that dock would be on what parcel, if you recall?

A. It is on parcel 7.

Q. That is the parcel marked in blue on the government's exhibit here?

A. That is correct.

Q. And that correctly shows it, as it existed at the time of the taking of the picture?

A. It does.

Mr. Monroe: We will offer the picture as our next numbered exhibit.

The Clerk: Exhibit I.

Mr. Landrum: Exhibit I is objected to upon the ground and for the reason that it depicts conditions having been brought about by the action of the government.

The Court: The objection will be overruled under the [157] same conditions as heretofore stated, ladies and gentlemen, with respect to these other photographs.

(The document referred to was marked Defendant National City's Exhibit I, and was received in evidence.)

[Defendants' Exhibit I—Photograph of shipyard or portion thereof. See original.]

Mr. Monroe: I thought perhaps this might be a good time to show this map and the pictures to the jury.

The Court: Very well. Have you identified all of them that you want to offer now?

Mr. Monroe: Yes. They are all in evidence and marked.

The Court: So ordered. You may pass them around.

Q. By Mr. Monroe: Might I inquire, Mr. Eisenman, as to whether there was any material change between the 10th of November and the dates given on these photographs?

A. Well, we were doing a lot of work. I would say there was quite a little change in the landscape.

(Thereupon the map and photographs referred to were handed to the jury.)

The Court: Apparently the jury has finished its inspection of these exhibits.

We will take our recess now, ladies and gentlemen, until 2:00 o'clock this afternoon. Remember the admonition and keep its terms inviolate. 2:00 o'clock.

(Whereupon, at 12:00 o'clock noon, a recess was taken until 2:00 o'clock p. m. of the same day.) [158]

San Diego, California, Tuesday, February 18, 1947.

2:00 p. m.

The Court: All present. Proceed, gentlemen.

T. W. EISENMAN

the witness on the stand at the time of recess, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination (Resumed)

By Mr. Monroe:

Q. Were you able to procure that large picture that we spoke of?

A. It is there in the other room. I believe the bailiff said he would get it if we needed it.

Mr. Monroe: Could we have that large photograph?

Q. Do you recollect the date of the taking of the photograph? A. Yes; September 13, 1942.

Q. It was taken by you? A. Yes.

Q. And it correctly depicts the condition of the entire area as it then was? A. Yes; it does.

Q. Is the photograph which the bailiff produces the one you had reference to? A. It is. [159]

Mr. Monroe: We will offer it in evidence, your Honor.

Mr. Landrum: Could I ask the designation of the exhibit, what it would be?

The Clerk: It would be defendant National City's Exhibit J.

Mr. Landrum: Defendant National City's Exhibit J is objected to upon the ground and for the reason that it visualizes matters other than the land. It visualizes improvements having been made upon the land by the government.

(Testimony of T. W. Eisenman)

The Court: Manifestly, it does, of course. The evidence will show when those improvements were installed if the case is properly presented. Overruled.

[Defendants' Exhibit J—Photograph of shipyard or portion thereof. See original.]

What is the scope of the panoramic picture?

The Witness: Do you mean in degrees?

The Court: No; just the area.

The Witness: It covers from the approximate location of where the pier was built on the bulk head line, Dike 1, Dike 2, and over to about the south line of Parcel 1. The telephone pole you see on the right side is built along the south line of Parcel 1.

The Court: Does it show Parcel A at all or any portion of it?

The Witness: No. Parcel A is all bayward from there. It also shows land to the north of Parcel 1 that was originally—or we started to develop it originally but it was [160] never completed.

The Court: Then, the panoramic photograph depicts property other than the property that is involved in this action?

The Witness: Yes. On the left side, probably the top three inches of the photograph, the property is probably off of the site; I would say for the first two feet on the left side of the photograph; and then all the rest of it is of Parcel 1.

The Court: Proceed.

(Testimony of T. W. Eisenman)

Q. By Mr. Monroe: Mr. Eisenman, I wonder if you could give us briefly a description of the subject area with reference to how the land lies, what sort of land it is, whether it is smooth, hilly, or whatnot?

A. At what time?

Q. In 1942, in November.

A. Well, in 1942, the land along the bulk head line, that is, where the land meets the water, was approximately at an elevation of 11, that is, 11 feet, above the mean lower tide, and sloped toward the city down to an elevation of plus 8 and, generally speaking, it was quite even in contour. There were no humps or hills but it generally sloped from the ocean toward the land at about a three-foot difference in elevation across the whole site. [161]

Q. Now, approximately how much of the area was occupied by the Concrete Company's shipyards?

A. In November, 1942?

Q. Yes.

A. Well, it was in a fluid state at that time, but, generally speaking, at that date I believe I am safe in saying there had been some work started on all of the land in question; that is, we had started to improve all of it. However, it was not complete, so just exactly where the development was at that time is hard to say without reference. But I could tell exactly where the development was, if you care to have that information.

Q. I was just trying to get it approximately. Now, let me ask, you have stated that in November of 1942 the shipyard was approximately 80 per cent constructed?

A. That is correct.

(Testimony of T. W. Eisenman)

Q. During what period of time, or how long was it before that construction was completed?

A. I believe about May, 1943 we considered the yard substantially complete. Of course, from time to time there were improvements put upon the land that were not contemplated in the original development.

Q. But it was, for practical purposes, a completed shipyard in 1943?

A. That is right; about May, of 1943. [162]

Q. Although it had been in actual operation and producing ships? A. That is correct.

Mr. Monroe: Might I have that exhibit, that map?

(The document referred to was handed to counsel.)

Q. By Mr. Monroe: In connection with the exhibit numbered Exhibit F, have you in preparing this map taken into consideration the various portions of the various parcels that were submerged and that were above the water?

A. Yes. The areas of the parcels as a whole is stated hereon, and also the areas of the portion of the parcels that were periodically submerged due to tides.

Q. Where do you find those?

A. They are, for instance, parcel 1,—would you like for me to read those?

Q. Suppose we get those figures.

A. On parcel 1 the entire area, as stated hereon, is 800,034 square feet, more or less, and the portion of that area that is submerged periodically due to tides is 49,000 square feet, more or less.

As to parcel 2, the total area is 191,468 square feet, more or less, and it is all above the tide.

(Testimony of T. W. Eisenman)

Parcel No. 3, 1,482,090 square feet, more or less, and of that amount approximately 408,000 square feet is periodically submerged. [163]

Parcel No. 4—

Q. We do not take No. 4 in this matter.

A. Parcel No. 5, 45,039 square feet, and all of that is above the influence of tides.

Parcel 6, 53,739 square feet, more or less, and all of that area is above the influence of the tide.

Parcel 7, 272,626 square feet, more or less, and approximately 44,000 square feet is periodically submerged due to tides.

Parcel No. 8, 11,199 square feet, and approximately 1,000 square feet is periodically submerged due to tides.

Q. And area A is what?

A. Area A is 1,346,756 square feet, more or less, and is entirely submerged.

Q. Now, as to area A you have shown the situation as of November 10, 1942. I will ask you what change, if any, in the conditions of area A there were as of October 3, 1944.

A. You mean what changes had been made from November 10, 1942 to October, 1944?

Q. Yes, sir.

A. While there was considerable dredging that was performed in the interim, and a portion of a pier was built, the bulkhead was partially constructed along the bulkhead line, the south bulkhead along the mole was constructed, and offhand I would say that was the extent of the improvements. [164]

(Testimony of T. W. Eisenman)

Q. Now, as to the dredging, what dredging had there been?

A. Well, offhand I couldn't state what the quantity of dredging was. I could look that up, but—

Q. Well, just approximately.

A. I would say that two-thirds of the dredging was done after that date, that is, November 10, 1942. That is very approximate.

Q. Now, let us take the whole amount. That would be about how much of an area had been dredged, out to what depth, if you can give that?

A. Well, this is also quite approximate. I would say probably six acres of area had been dredged prior to November 10, 1942. As I recall, there was around 18 acres totally dredged, so that would leave 12 acres dredged after November 10, 1942.

Q. Now, with respect to this company, you occupy what position besides your engineering capacity?

A. I am—my title is assistant to the managing partners of Concrete Shipbuilders.

Q. And what is your position in the Tavares Construction Company?

A. I am vice-president of the Tavares Construction Company.

Q. You were in that company at the time that it first [165] started to occupy this property for the purpose of the shipyard?

A. I was. [166]

Q. By Mr. Monroe: Just generally, what particular characteristics did this property have, that you considered when you located your shipyard there in the first instance?

A. Of Course, No. 1 was situated on the bay and it was in such a location that it could be economically de-

(Testimony of T. W. Eisenman)

veloped into a shipyard. And those are the only features that were involved.

Mr. Monroe: You may inquire.

Cross Examination

By Mr. Landrum:

Q. Mr. Eisenman—is that your name?

A. Yes, sir.

Q. You have been with this project from its inception. A. That is correct.

Q. When did you first go upon the land with which we are here concerned to know it?

A. Oh, I couldn't say exactly but probably in the fore-part of November, 1941.

Q. November, 1941? A. Yes, sir.

Q. Are you able to describe for us this land before there was any work done upon it, in the improvement of it?

A. Do you mean before we did any work?

Q. Yes; whether there were any rocks turned or anything. [167]

A. It was a piece of land that laid very nicely in connection with the bay. It had been filled to an elevation of eight to 11 feet. The great portion of the land was dry.

Q. Will you step down to this map and just explain to the jury everything about each parcel and tell them what it was?

A. This line here is what is known as the U. S. Bulkhead Line. This line here is the pier head line. This is where the water starts, and the land starts in this direction. When the land was originally filled, there was an offset back eight feet toward the land from the U. S.

(Testimony of T. W. Eisenman)

Bulkhead Line, and a dike was built along this line. That dike also extended out in this direction, following the pointer here, and back down in this direction. As this land started out, it was tideland, that is, periodically, due to the action of the tides, it was covered with water. Behind this dike and the land it was filled with sand and that was brought to an elevation along the front here of approximately 11 feet, and it sloped back to meet the land, that is, the land that was here, to an elevation of approximately eight feet. This whole area was generally level, that is, it was uniform—not level but uniform—and there was an absence of any hills or gullies. This area here—

Q. You are pointing to Parcel A, are you, on Exhibit 1? [168]

A. Parcel A. This area varied in water depth. It was entirely covered with water and varied in water depth from, I would say, 10 feet below the datum point to the highest probably of say plus 1 or 2 feet over in this corner here. And, generally speaking, the average elevation of this parcel would be approximately minus 4. You could take a rowboat and go over the entire area.

Q. Who was the man actively or actually in charge of the construction or the changes as they took place in this land? Did you have to do that?

A. Yes; I had to do with that. I was the engineer that had charge of the work.

Q. Now, Mr. Eisenman, I want you to take this exhibit with me, which is Defendant's Exhibit F. Will you take Defendant's Exhibit F, taking the parcels separately, by number, and tell the court and jury when the first

(Testimony of T. W. Eisenman)

change or the first improvement was made upon each of those parcels?

A. On Parcel 1 the first improvement was a building that was constructed on this parcel. As I recall, it was for a warehouse. And that was on the first day of January, 1942.

Q. January 1, 1942, there was a building put on there?

A. That is correct. I might say this, that, prior to that date, there was some exploration work done but not construction. [169]

Q. What do you mean by exploration work?

A. We drove some test piles to determine the bearing value of the soil.

Q. Do you know about when you drove those test piles?

A. I think about the day before Christmas, 1941. On Parcel 2, a mold loft was started on August 17, 1942.

Q. What is a mold loft?

A. A mold loft is, in simple terms, a large drafting table, so to speak, that you lay out ships on. This drafting table is a hundred feet or so long and 50 or 60 feet wide.

Q. Is it attached to the real estate?

A. They pour a concrete slab or walk or floor and upon that is built a wood floor so that the carpenters and engineers can lay out the ship. On Parcel 3 was the starting of Dry Dock No. 3 on September 5th, which appears to be the initial work.

Q. Parcel 4 isn't in the case now.

A. The construction of Dry Dock No. 4 was started, on September 12, 1942, on Parcel 5. As to Parcel 6,

(Testimony of T. W. Eisenman)

we are without a record of the initial occupation of that parcel because it was not used for our purposes before that.

Q. Was any particular use made of Parcel 6 prior to November 10, 1942?

A. Yes, sir; very likely we stored some lumber there or [170] something of that sort. As to Parcel 7, on September 5, 1942, we started clearing that area of the San Francisco Bridge's gear, of pontoons and what have you. As to Parcel 8, we haven't any record of when the initial use was made of it and there was no specific operation had on that parcel.

Q. So that you hadn't done anything on it before November 10th?

A. We may have parked equipment or lumber on it but there was no specific structure constructed there. Are you interested in these other parcels?

Q. You might give us Parcel 9. That is the Johnson parcel.

A. I would have to look that up but I can make a guess on it. I have that in my diary. The initial construction there, I believe, was about May 10, 1942. That is an approximate date. I didn't get that date. I would say May 10th is an approximate date. That can be confirmed by my diary, though. On Parcel A, the dredging was the first work there. That started August 27, 1942.

Q. When you say that the dredging started on Parcel A on August 27, 1942, tell the court and jury what, if

(Testimony of T. W. Eisenman)

anything, you did on Parcel A prior to the time you actually started the dredging.

A. Well, early in 1942 and late in 1941 we made soundings to determine the amount of yardage there was to be [171] dredged, and from these soundings we determined the exact position to do the dredging, where the channels were to be and so on.

Q. When you say that you started dredging on August 27, 1942, on Parcel A, just tell us briefly what you mean when you say you started dredging. What did you put there and what did you do?

A. We came in there with a float dredge, a hydraulic suction dredge, and on that date is the date that actually they lowered their boom and started digging into the soil and taking it away. It is quite likely that two or three days before that pipe was laid and preliminary work was done but the actual dredging started on that date with the removal of the sand. This dredging was done to deepen the harbor so ships could come in.

Q. Now, Mr. Eisenman, I notice on Defendant's Exhibit F, particular up here on Parcel A, some figures, the figures to which I am now pointing, 1.6 and 0.9. What does that mean?

A. That is the elevation of the land with reference to the mean low low water.

Q. That isn't very clear to me. Does that mean that that water was that deep there or that there wasn't any water or what?

A. Mean low low tide water was that deep. [172]

Q. How deep was the water right here?

A. 11 feet and 3/10ths.

(Testimony of T. W. Eisenman)

Q. Do you know the date that those soundings were taken? A. Not exactly, no.

Q. About when was it?

A. I would say in the latter part of 1941 or the first part of 1942.

Q. Just take another point right along over here. How deep was the water there?

A. That point is 5 feet 11 inches below the datum plane. This corner it is three and a half feet above.

Q. In other words, at the date that sounding was taken that was out of water?

A. That was out of water.

Q. What is this plus mark?

A. That is plus 4/10ths, nearly half a foot.

Q. Is there any place out here that is out of water?

A. It is just confined to the area near the bulkhead line. The reason for that is that you had a dike and a fill that ran out in the water a short ways.

Q. Just one further question. How did you take those soundings?

A. First, you establish a reference line along the land. In this case the reference line was the reference [173] line established by the U. S. Army Engineers, which was on this 80-foot offset line. Then you measure off the distances that you desire these soundings to be taken and set an instrument up there, a transit or a

(Testimony of T. W. Eisenman)

direction instrument, and ascertain the angle that you desire to take the soundings on. Then a man goes out in a boat, or several men go in a boat, and you drop a weight down. This weight has a line on it that is marked off in feet. And at the same time you have a tide gage, and another man observes the tide gage so that at all times you know where the tide is in reference to the datum plane, and you take these readings, the depth they are below the water, and record them. And, after you finish them you plot them on a plat for some sort of reference. That is originally plotted on a different scale plat and then transferred to this for this purpose. Now, where they are above the datum point, and substantially above the datum point, you ascertain this reference with the aid of a spirit level or a leveling instrument of some sort. [174]

Q. Well, there is just one further question about this datum point. Is that a datum point that you arbitrarily took is that the level of the sea?

A. That is the datum point established by the United States Coast Geodetic Survey. That is what engineering is based on down here.

Q. That is based on the sea level, however?

A. It is based on the fluctuation of the tide; mean low low water.

Mr. Landrum: That is all. Thank you.

(Witness excused.)

HENRY PHILLIP ANEWALT,

called as a witness by and on behalf of the defendant National City, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: Will you state your name, please?

The Witness: Henry Phillip Anewalt, A-n-e-w-a-l-t.

By Mr. Monroe:

Q. State your name, please, to the jury.

A. My name is Henry Phillip Anewalt.

Q. You live where?

A. I have lived in the city of San Diego for a little over 19 years.

Q. What is your business? [175]

A. Real estate and insurance broker, and agent.

Q. You are duly licensed as a broker in the State of California?

A. Yes, sir. I have been that since 1926.

Q. What, generally, has been your line of business as a broker?

A. Since I went into the real estate business I have been specializing in the sale and the lease and management of industrial properties, primarily, and of commercial properties, more or less secondarily.

Q. Have you had experience in appraising property?

A. Yes, sir. I have appraised for the federal government, the State of California, the City of San Diego, the La Mesa-Lemon Grove Irrigation District, various banks and insurance companies, the Santa Fe Railroad, and a number of others.

Q. Over what period of time have you acted as such appraiser?

A. Oh, for approximately 14 or 15 years, anyway.

(Testimony of Henry Phillip Anewalt)

Q. Now, are you associated in any firm here in San Diego?

A. Yes, I am a member of the firm of Hotchkiss & Anewalt.

Q. What is the name of the Hotchkiss of that firm?

A. L. G. Hotchkiss. [176]

Q. During the last four or five years were you still engaged in the real estate business?

A. For the period from February, 1942 until January of 1946 I was in the United States Navy, but I still retained my interest in my real estate firm, and I was fortunate enough to be on duty in San Diego from the time I went back in the Navy until I was sent overseas in January of 1945; and I kept in close touch with my office, and also with the real estate business as a whole, and values.

Q. During that period did you keep in touch with the transactions handled by your office?

A. Yes, sir.

Q. And the sales and leases made?

A. Not only that, but I saw a number of the boys that were in the business, and I was very much interested periodically in checking up on the trend of values and rentals.

Q. Particularly during that period, did you continue to keep in touch with the valuations of property in and about San Diego County?

A. Yes, sir.

Q. As a result of your experience, Mr. Anewalt, have you become familiar generally with the properties around San Diego and National City, and their values?

A. I have.

Q. Did you make an investigation as to the properties [177] that are in dispute here, and I have particular refer-

(Testimony of Henry Phillip Anewalt)

ence to parcel A, and to parcels 1 to 8, inclusive, except 4, for the purpose of ascertaining their value?

A. I made a very extensive one, yes, sir.

Q. Now, I wish you would state first, in a general way, what examination and search you have made for the purpose of ascertaining that value?

A. Well, I went down on the site to refresh my memory of it, I had not seen it for a number of years, and checked over the physical condition, checked over the charts and the maps that covered the area. I made quite an extensive check through the records I had of tideland leases in the city of San Diego, checking the leases that were on the property, two of them, the only two I could find, of the Tavares Construction Company and the San Francisco Bridge Company.

I checked our own records, and with other real estate brokers handling that industrial type of real estate, as to sales and leases and general trends in the market. I checked down at the Harbor Department to see just what the picture was on the amount of industrial lands of the Harbor Department that might be available for lease, and what the conditions of those lands were; checked over the number of the leases, to refresh my memory as to the terms of the San Diego Tideland leases. I made an investigation into general conditions as to the development of the Bay area; checked with [178] the Assessor's office to check on the trend in their own assessments, and checked the tax rates of National City and San Diego as two more or less competitive areas.

Q. Now, let me interpose at that point. While you were in the Navy this last time, what particular job did

(Testimony of Henry Phillip Anewalt)

you have? I mean with reference to what sort of thing you were handling?

A. Well, during the time I was in San Diego, that was from 1942 until 1945, I was what was known as the Naval Transportation Operations officer and Assistant Port Director.

Q. As a part of the duties of that office, were you generally familiar with the Bay and its surroundings?

A. I had to be very familiar with the Bay and its surroundings, because we handled the loading, the embarkation and disembarkation of troops, and the handling of small craft, and various other things along those lines.

Q. Prior to your going into the real estate business, did you have some connection with the business of shipping and transportation?

A. Yes, sir. I was seven years in the steamship business prior to my coming to San Diego.

Q. Now, to get back again to these areas of land, in endeavoring to determine their market value, I wish you would tell the jury what different factors you took into consideration. [179]

A. Well, I took into consideration the fact that a state of war existed in 1942 and was still in existence in 1944, and so far as could be determined reasonably, there was no time at which it might end. I took into consideration the conditions of the tideland area in San Diego Bay. An investigation of the leases of competing, so-called competing tidelands of San Diego disclosed the fact that their leases, as a whole, start in at around one cent a foot,—

Mr. Landrum: Just a moment. If the court please, I object to any comparison or any statement of the lease

(Testimony of Henry Phillip Anewalt)

rentals in the city of San Diego, as not being comparable to this situation.

The Court: I think he should be permitted to detail without too much an extent his experiences in making his investigation, without going into the exact details.

The Witness: I considered the terms of their leases, and, among other things, the fact that they had a cancellation clause in them, that the lessor, the City of San Diego, had the right to terminate the leases.

Mr. Landrum: Just a moment. I object again, if your Honor please, in that he is discussing leases with the City of San Diego.

The Court: Yes. The leases must be produced if you are going into that. He should confine himself generally to his knowledge of the project in suit and of the conditions that [180] obtained at the time of the taking. If you want to explore leases, you would have to produce them so that we would be able to look at them, and so forth, and so on.

Mr. Monroe: Yes.

The Witness: I considered the availability of industrial lands that were serviceable both by rail and by water. I took into consideration the fact that this land had the facilities of the Santa Fe Railway along its eastern border; that it was serviceable by city streets, sewer, water, power, electricity. I took into consideration the uses to which the land was adapted and could be placed. I took into consideration the limitation particularly on M-1 zone property, and I might say M-1 zone is a heavy industrial zone, and that this property is zoned M-2, at least. I should say M-1 is the light industrial, and that this land—that there is relatively little of this type of zone land available.

(Testimony of Henry Phillip Anewalt)

I took into consideration the depths, according to the charts, of the water adjoining this land; took into consideration the fact that a 30-foot ship channel adjoins part of the land, or, at least, area A, which is land and water, or is all water so far as being submerged. I took into consideration the elevations of the land, the fact that it was solid land.

That about covers it, Mr. Monroe, I think.

Q. Now, Mr. Anewalt, with reference to the uses of [181] the property or the uses to which that property was adapted, what, in your opinion, was it particularly adapted for?

A. It was particularly adapted for shipbuilding, adapted for fish canneries, adapted for any of the uses to which similar lands were being placed in San Diego Harbor.

Q. Such things as lumber yards?

A. Lumber yards, and oil—bulk oil terminals.

Q. Would it be fair to say that it was generally adapted for any business that required shipping facilities fronting on the Bay?

A. To all intents and purposes, it would, yes, sir.

Q. Now, what, in your opinion, was the highest and best use to which the property was adapted?

A. In 1942 and 1944, unquestionably for shipbuilding.

Q. What particular things did you have in mind that would make it peculiarly adaptable for that purpose?

A. Its being immediately adjacent to a deep water channel, the fact of the ability to put in either ways or basins, and it had all the other facilities, particularly rail, which is an important item, and the other facilities necessary, from what I had been able to ascertain. The soil

(Testimony of Henry Phillip Anewalt)

conditions were good for it. Of course, we were in a state of war then, and ships were the most necessary things that we could possibly get at the moment.

Q. Now, in making your investigation, did you consider [182] that this was of the character of tidelands?

A. Yes, I did.

Q. What was the situation with reference to the availability of similar lands?

A. Well, in my checking with the Harbor Department as of 1942, they had available, but spoken for, 1.2 acres in the industrial area; in 1943, none; and in 1944, there were six acres, which also I understand was spoken for.

Q. That would include the industrial area of tidelands of San Diego all along the Bay?

A. In the City of San Diego—no, that would include what is considered as the industrial lands, which would be substantially from Fifth Avenue southeasterly.

Q. Now, in making that investigation, what was the situation with reference to the lands, those tidelands which were occupied? Were they leased or were they in the hands of private owners?

A. All of the lands in the City of San Diego were leased or on permit, one or the other, which is substantially the same.

Q. You mean by that they all retained their original character as tidelands? A. As to title?

Q. Yes. A. Yes. [183]

Q. Now, this particular area is located where with reference to the industrial tidelands of San Diego?

A. Just south.

(Testimony of Henry Phillip Anewalt)

Q. That is the National City line joins on to the—

A. City of San Diego's line, but the destroyer base, so-called, abutted the National City-San Diego line, and then it spread over beyond the line into National City, so this would adjoin the destroyer base, but not the San Diego-National City line.

Q. Then it is correct that there would be no land which would be available for leasing for industrial purposes between the industrial lands of San Diego, on the one hand, and the subject property on the other?

A. Industrial tidelands?

Q. Yes. A. That is correct.

Q. What, generally, did you consider as the physical characteristics of the land, as to how it lay?

A. Well, in 1942, in the early part of 1942, it was uneven, more or less as any filled land is that has not had a Fresno over it, and leveled out. It was not perfectly smooth. As I recall it, either in '41 or '42 there was a Santa Fe wire that stuck out in there. And what part of 1942 do you particularly refer to?

Q. What I am getting at, Mr. Anewalt, is more the [184] natural character of the land itself, before improvements were started.

A. Before the improvements were started?

Q. Yes, before they were started.

A. Well, fairly uneven; a typical filled land, that is, primarily sand and some silt in it.

Q. And outside of such smoothing as it would require, did it lie generally even?

A. So far as I can recall, yes.

Q. I mean for practical purposes.

A. Yes, it was even.

(Testimony of Henry Phillip Anewalt)

Q. Did it so lie that it could, with any great amount of leveling, be suited for the purposes you have mentioned? A. Yes, it could.

Q. Now, taking into consideration—let us start first with area A. Taking into consideration all of the things that you have considered in arriving at your opinion, did you form an opinion of the fair market value of area A as of October 2, 1944? A. I did.

Mr. Landrum: Just a moment. If the court please, that is objected to upon the ground and for the reason that it gives an improper date as the date of valuation. I would like to be heard, if I might, for just a moment upon that.

The Court: We discussed that yesterday quite a little. [185]

Mr. Landrum: Yes, sir.

The Court: I think we will hear the evidence as to both dates. Then at the proper time I will consider such motions as may be properly projected at that time, and instruct the jury as to the rule that is applicable.

Mr. Landrum: Yes, your Honor. The date that I believe counsel called off was October—

The Court: October 2nd.

Mr. Monroe: I think I should have said October 3rd, probably. I will look.

I should have said October 3rd.

The Court: Do you want to amend the question?

Mr. Monroe: Yes.

Mr. Landrum: I have the same objection, your Honor, that it is an erroneous date of valuation.

The Court: Will you read the question now, Miss Reporter?

(Question, as amended, was read.)

(Testimony of Henry Phillip Anewalt)

The Court: The objection is overruled.

Mr. Landrum: May we have an exception, your Honor?

Q. By Mr. Monroe: The question is whether you formed an opinion. A. I did.

Q. Now, Mr. Anewalt, before I ask you exactly that opinion, you have spoken of the fair market value, and will [186] you, for the record, give your definition of what is the fair market value?

A. That amount of money, in terms of dollars, that a willing buyer would pay and a willing seller would sell for, with full knowledge of all of the conditions surrounding the transaction.

Q. And would you add to that,—

A. And a reasonable period of time.

Q. And a reasonable period of time?

A. That's right.

Q. I will ask you, then, to state for us your opinion of the value of area A as of the date given, and considering it in its then condition, but eliminating from consideration any structure that might be placed on it.

Mr. Landrum: That is objected to, if the court please, first, upon the ground and for the reason it is an improper date. Secondly, upon the ground and for the reason that it includes within itself an increment of value brought to it on the expenditure of funds prior to the date given, on this project itself, by the government of the United States.

The Court: Objection overruled.

Mr. Landrum: May we have an exception, your Honor?

The Court: Yes. You may have an exception to each adverse ruling.

(Testimony of Henry Phillip Anewalt)

Mr. Landrum: I beg your Honor's pardon. [187]

The Witness: Could I get that question again?

The Court: Read it, please.

The Witness: Was it to give the opinion?

Mr. Monroe: Perhaps we had better have it read to make sure of the things that I put in it.

(The question was read.)

The Witness: In my opinion, that area A was worth \$269,350.

Q. By Mr. Monroe: Now, in arriving at that opinion and in detailing your investigation, you have not mentioned sales, comparable sales of property?

A. I haven't mentioned them, Mr. Monroe, because there are, to my knowledge, no sales of comparable property. The lands of that nature are held by the municipalities to which they adjoin, under the Tideland Grant Act, and as far as I know, normally can't be severed or haven't been severed.

Q. However, in giving your opinion as to value, you considered its market value as of that date, assuming for the sake of the question that it was then salable?

A. Yes, sir, I did, and with all the benefits that would go with the fee owner or somebody being able to own such a parcel of land, with the facilities and opportunities that that land gives.

Q. Now, what would be the fact, assuming that that property was salable as of that date, as to its value, [188] considering the fact, if I properly assume that fact from your answers, that other property similar in physical characteristics was not salable at all?

A. It could not be sold. It had been salable if it could have been sold.

(Testimony of Henry Phillip Anewalt)

Q. I say, assuming this piece was salable, what would be the effect on its value of the fact that other similar properties could not be so purchased?

A. It increases, it makes it considerably more valuable because it gives, with the benefit of ownership, it gives the right to hypothecate, and a number of other things. That is one of the difficulties of leased land.

Mr. Monroe: Now, if your Honor please, might I inquire, because I want to be sure not to transgress here: do I understand you want as to all of the parcels the valuations as of the two different dates at this time?

The Court: No, only as to parcel A.

Mr. Monroe: As to parcel A, yes.

The Court: As to the numbered parcels, the date has been fixed, I believe.

Mr. Monroe: As of November 10th.

The Court: 1942.

Mr. Monroe: I want to keep within those limits.

Q. By Mr. Monroe: Now, Mr. Anewalt, in the same connection did you form an opinion as to the market value, [189] the reasonable market value of the seven parcels, 1 to 8, inclusive, except 4, as of the date of November 10, 1942?

A. Yes, I did.

Q. What, in your opinion, was the reasonable market value of those, or, of that body of land as of that date?

Mr. Landrum: That is objected to, if the court please, upon the ground and for the reason that it includes within itself an increment of improvement done by the very project itself.

The Court: Overruled.

The Witness: \$495,940.

(Testimony of Henry Phillip Anewalt)

Q. By Mr. Monroe: In arriving at that valuation, what assumption do you make as to that property, whether it was salable, for the purpose of the question?

A. The same thing applies to that one as did to the other, that it would be of material value with the ability to hold it in fee.

Q. In arriving at that valuation, you considered that as one contiguous parcel?

A. As under one ownership and one contiguous parcel.

Q. Now, in order to complete that showing, what valuation would you place as of the same date, that is, November 10, 1942, on area A?

Mr. Landrum: That is objected to, if the court please, upon the ground and for the reason that it includes within [190] itself the changed condition of the land between the time it was first touched and up to the date he gives.

The Court: Overruled.

The Witness: Do I understand that you want to know my opinion of the value of area A as of November 10, 1942?

Q. By Mr. Monroe: Yes, as it then was.

A. As it then was, in 1942?

Q. That is correct. A. \$134,676.

Q. Now, let's have the total value, in your opinion, of the entire area, including A, as of 1942, assuming that it was all valued as of that date, November 10, 1942.

A. \$630,615.

Q. In arriving at those estimates of value, have you taken into consideration rental values of property?

A. I have taken into consideration the rents that these values would reflect, and I have taken into consideration how they compare with competitive rentals of similar lands under similar conditions.

(Testimony of Henry Phillip Anewalt)

Q. That is, that value for rental is one of the things that you considered in arriving at your final opinion?

A. It is a consideration, and it is more of a test of value than it is a direct consideration of value.

Q. Now, let me have your total figure, valuing the numbered lots, the seven numbered lots or seven numbered [191] parcels as of November, 1942, and area A, the submerged area, as of 1944? What would be that total value? [192]

Mr. Landrum: That is objected to, if the court please, upon the ground and for the reason it contemplates an impossibility.

The Court: What is the impossibility?

Mr. Landrum: There are two dates. A date in 1942—that portion of the land then would only have been sold off and it couldn't be added to Parcel A two years later.

The Court: The sum of the question is that it is simply a mathematical addition of two items that have already been testified about. I think that is all there is to it.

Mr. Monroe: That is correct, your Honor.

The Court: The jury can make the mathematical computation as well as the witness. I will sustain the objection.

Q. By Mr. Monroe: With reference to the difference that you have noted in the value of Area A between 1942 and a time approximately two years thereafter, what elements went into that difference in the valuation?

A. Elements of useability of the area due to dredging and advantages that they would get for both ingress and egress, for mooring and for other uses that water could be placed to.

(Testimony of Henry Phillip Anewalt)

Q. Were there any other considerations as to value?

A. I don't think of any.

Q. What I am getting at, Mr. Anewalt, is whether, in the period between 1942 and 1944, there was or was not a decided change in market values. [193]

A. I didn't follow the question; I am sorry.

Q. I say, in the period between 1942 and 1944, was there or was there not a decided change in market values?

A. There definitely was an increase, a material increase, in rent values and sales values between the latter part of 1942 and the latter part of 1946.

Q. Would that increase any of the rent and sales values of that property?

A. All of this property; yes, sir.

Mr. Monroe: At an appropriate time, your Honor, I want to make an offer of proof to protect the record on that, whenever you think is the best time to make it.

Q. There is one question I would like to ask. We have discussed, Mr. Anewalt, the date of October 3, 1944. Calling your attention to the date of September 23, 1944, would there be any difference in your valuation, or your answers with reference to it, if we assumed that date?

A. No; I don't think in that period of time there would be any recognizable change.

Mr. Monroe: You may inquire.

Cross Examination

By Mr. Landrum:

Q. Mr. Anewalt, I understand just now, in response to a question which counsel asked you, you gave him your opinion of the fair market value of Parcel A, to which I am now point- [194] ing on Plaintiff's Exhibit 1, did you not?

A. That is correct, sir.

(Testimony of Henry Phillip Anewalt)

Q. You gave him your opinion of the value of that parcel of land alone and singly, did you not?

A. That is right.

Q. And by that did you mean to say that this Parcel A, standing alone, without any upland here, was worth the amount of money you said? A. Yes; I did.

Q. Did you consider it as worth anything unless you had an approach to it from the upland?

A. You have a parcel of water with the other lands that, to all intents and purposes, would be accessible to it.

Q. Parcel A was a parcel of some 30 acres of land, covered with water, wasn't it? A. That is correct.

Q. You gave a value to that parcel of land standing alone, did you not? A. That is correct.

Q. Without any way to get to it?

A. Oh, yes; you could get to it by boat.

Q. Was there any other way you could get to it?

A. Yes; there are a number of ways you could get to it; fly to it or swim to it.

Q. But, in order to get clear what you meant to do was [195] to tell this court and jury that, in your opinion, this parcel of 30 acres of land, covered with water, standing alone, was worth \$269,350, is that right?

A. It would be worth that to the people that obtained it; yes, sir.

Q. But, Mr. Anewalt, there wasn't anybody adjoining it. He asked you for the market value of that alone.

A. The market value if I had that for sale?

Q. Standing alone. A. That is right.

(Testimony of Henry Phillip Anewalt)

Q. You also gave your opinion of the market value of Parcels 1 to 8 inclusive, exclusive of Parcel 4, without any water, didn't you?

A. No; I did not. If you will notice on the chart there, there is water in Parcel 3.

Q. Will you come down and show me Parcel 3?

A. This is Parcel 3 on this light blue, or whatever the color of blue is, this area here that comes out here. Your 30-foot channel is out here and you have water and submerged land here.

Q. All right. What was your opinion of the value of Parcel 1, standing alone, without Parcel A in front of it?

A. I didn't value one as a separate parcel.

Q. Will you do it for us or can you do it?

A. I could if I had the time to figure it out. [196]

Q. But, in order to understand it, isn't it a fact that this is all one contiguous ownership and Parcel A's value is reflected in the back land and the back land value is reflected in Parcel A?

A. One would reflect the other.

Q. And that is the only way it would have any value, isn't it?

It would be all together and used together?

A. Well, it would have a value separately if the other land didn't have it; and, if the other land didn't have it, he could have access to Parcel 3 up there. They are all one ownership, 1, 2, 3, 7 and 8.

Q. Mr. Anewalt, could I ask when you first undertook the labor of making your appraisal, when you first started to do it? A. On this particular appraisal?

Q. Yes.

A. About 10 days ago, I would say, or two weeks ago.

(Testimony of Henry Phillip Anewalt)

Q. At that time were you requested to set a separate valuation on Parcel A as of the time you have given us now?

A. At that time I was asked to appraise it as of 1944. I think it was November—September something or other.

Q. As one parcel, weren't you?

A. That is right.

Q. When did you first break it down and give Parcel A [197] a valuation alone?

A. I don't quite follow you.

Q. When did you first arrive at a conclusion with relation to the value of Parcel A standing alone, as you have given it here today?

A. As I was developing the appraisal or my opinion at least.

Q. Did you start out to give an opinion of Parcel A separate from the balance?

A. Parcel A was of a different date.

Q. Who gave you the date? A. Our attorney.

Q. Do you know of all the sales of land in the city of National City within the last few years? Have you made a check of them?

A. I haven't made a check of all the sales; no, sir. We have had some sales that were handled in our business in through there but I wouldn't have made an attempt to give all of the sales in National City. If I had, it would only be industrial property that was serviceable by the railroad.

Q. In the city of National City, not San Diego, do you know of a single sale of industrial property, in the

(Testimony of Henry Phillip Anewalt)

city of National City, within any reasonable length of time, in 1942, for even \$2,000 an acre?

A. Yes. [198]

Q. In the city of National City?

A. Yes; in the city of National City.

Q. All right; give it to me.

A. There was one that was made by our office.

Q. Of land that you considered comparable to this?

A. Well, it was adjoining the Santa Fe and opposite the station out there in National City. We sold it for \$33,000, and it is about a block and a half square.

Q. How many acres?

A. That would be less than two acres.

Q. Now, tell me when you sold it and who you sold it to.

A. That is what I am trying to find here. That was sold in March, 1944.

Q. March, 1944?

A. March, 1944.

Q. So a buyer purchasing this property in 1942, on the 10th day of November—you couldn't have taken that sale into consideration, could you?

A. Not for the 1942 valuations; no, sir.

Q. You have got a valuation of a sale here in 1944?

A. That is right.

Q. Do you have any in 1942?

A. No; not in National City.

Q. Mr. Anewalt, you have approached this problem from [199] what we call the economic or profit standpoint, haven't you?

A. No; I have approached it as an industrial real estate problem. When we sell lands in the bay area here, we are not confined to an industrial section, when you

(Testimony of Henry Phillip Anewalt)

sell industrial lands, you sell where it is the most practicable place, whether in Chula Vista or San Diego or where. Industry doesn't go just on the basis of a community.

Q. Do I understand you to say, then, that, in so far as your opinion goes, this land is comparable right here in San Diego, right down in the industrial water front property?

A. In my opinion and from my experience in making tideland leases and selling industrial real estate for 19 years down here, that is true. It is comparable.

Q. It is your opinion that it is comparable to the land right here in San Diego? A. Yes, sir.

Q. Now, I ask you if you didn't approach it from the standpoint of profit or how much money was being paid under those leases. You stated that, didn't you?

A. I stated that, in my opinion, if I had that real estate for sale at those dates, I could have sold it for that. Now, I test that sales value by checking back against what it would return or for rental value. But I didn't use the rental value to make the sales value.

Q. You used it as a check? [200]

A. That is right.

Q. On your other value? A. That is right.

Q. As a matter of fact, you used the sales approach and the profit approach and then reconstruction value, less depreciation?

A. We have to take all three of them and make up our own judgment as to what we can do with it.

Q. I believe you did say that you used some leases as a check.

A. The terms and the rentals; yes.

(Testimony of Henry Phillip Anewalt)

Q. And, of course, what the property produces—that economic approach is a good method to check on the others, isn't it?

A. It is one form of checking; yes, sir.

Q. Tell us how much rental or how much the city of National City had been receiving as rent from anybody on this property, before the war.

A. Before the war, there was the San Francisco Bridge Company lease. I believe there was also a lease before the war with the Allied Engineering Company.

Q. Do you know how much rent the San Francisco Bridge Company was paying?

A. It is very difficult to translate it into dollars. It was paying a nominal amount of rent in a specified sum [201] and they agreed also to do dredging and improve.

Q. What is that specified sum?

A. I have got it here somewhere.

Q. Maybe I can cut this short. Just tell us all of the income that the city of National City received, from all of this property, in the year 1941, if you can.

A. I couldn't tell you all of it because I would have to figure it out.

Q. All you know.

A. It would be a cent a square foot on the original lease with the Allied Engineering Company.

Q. How many feet were in that? Who is the Allied Engineering?

A. That is the predecessor, I believe, to the Concrete Ships, the Tavares interests.

Q. They had a lease which they assigned to Tavares, is that correct?

A. I believe so.

(Testimony of Henry Phillip Anewalt)

Q. On how many acres?

A. I have forgotten the exact number of acres but I think I could check it through. I have got it in my files.

Q. If I told you six acres, would that refresh your recollection? A. I think it was around that.

Q. Six acres out of Parcel 1, is that right? [202]

A. I think it was a little more than six acres. It was not a large amount of acreage.

Q. How many square feet would there be if you are going to figure square feet, right quickly?

A. In 18 acres?

Q. In six acres.

A. It would be between 250 and 260,000 square feet.

Q. Can you give us your rough judgment as to what they received on this hundred acres of land in 1941?

A. The hundred acres was leased.

Q. I know it but I want to know all of the money they took in, in 1941, on this land.

A. That I don't know.

Q. Don't you think that a reasonably prudent buyer, in an investigation of this property on the 10th day of November, 1942, would inquire and want to know as to the income which had been derived from it prior to that time?

A. He certainly would but that wouldn't have any particular bearing on his judgment of it because of the fact in 1942 was the time—

Q. Will you give me your definition of fair market value?

A. Yes; that amount of money in dollars that a willing buyer, knowing all of the circumstances surrounding it, would be willing to pay, and a willing seller would be willing to [203] sell for, in a reasonable period of time.

(Testimony of Henry Phillip Anewalt)

Q. Do you understand that to include war or boom prices?

A. It includes any of the circumstances that surround the time. As far as boom prices are concerned, I wouldn't consider at that time that they had gotten into boom prices.

Q. How much per acre, if you can give it to me right quickly, was this Parcel A worth on November 10, 1942?

A. November 10, 1942?

Q. Yes; correct.

A. I have figured that at 10 cents a foot, which would be \$4,356 per acre.

Q. \$4356 per acre? A. That is right.

Q. That is Parcel A? A. Parcel A.

Q. You had a figure, in 1944, of \$269,000.

A. That was just twice that basic value. Rents and prices had increased and the water area had been dredged.

Q. In the figure which you have given us as of 1944, I believe October 3rd, and in the figure which you have given us as of the other date in 1942, which I believe was November 10th, did you include within that figure any increment or element of value which had been added to that land by virtue of the construction of the shipyard and the dredging of that property? [204]

A. Not in the 1942 value; no, sir.

Q. I want to get that straight. In your 1942 value, you did not include anything for any improvement of that property in the construction of this shipyard?

A. No; I didn't take into consideration any bulk-heading that had been put in or the removal of the "Y" or any of those things.

Q. I want to ask this further question, please. I believe that the testimony in this lawsuit is to the effect

(Testimony of Henry Phillip Anewalt)

that, on the 27th day of August, 1942, extensive dredging began on Parcel A. You didn't include anything for any of that in your 1942 valuation?

A. I am a little bit mixed up with you on the question, Mr. Landrum, if you will pardon me, whether you are talking now of Parcel A by itself or its effect on these other lands.

Q. No. I am trying to clear up that one point. I understood Mr. Eisenman's testimony to be that they started extensive dredging on Parcel A on the 27th day of August, 1942. Now, you have given us a value of November 10, 1942. Have you given us a value of the dredging done on there up to that time or have you discounted or forgotten all about that?

A. No; I haven't discounted or forgotten all about that but not for any physical improvements that were put on the land. [205]

Q. Did you value it as being dredged?

A. As being accessible to dredging; yes.

Q. If it was dredged by virtue of that operation which began on August 27, 1942, did you value it in the condition it was put in by that dredging?

A. That is right.

Q. You included that in your figure?

A. Yes, sir.

Mr. Landrum: At this time, if your Honor please, I move that all testimony of this witness with relation to the valuation of Parcel A be stricken on the ground and for the reason it includes in itself an increment of value which was brought about by the project itself.

The Court: Motion denied.

Mr. Landrum: That is all.

(Testimony of Henry Phillip Anewalt)

The Court: We will take our recess now for a few minutes, ladies and gentlemen: Remember the admonition heretofore given you. Please occupy the jury room.

(Short recess.)

The Court: All present. Proceed.

Mr. Landrum: If your Honor please, might I be permitted to recall Mr. Anewalt? There is one further question that I would like to clear up. I overlooked it.

The Court: Very well. [206]

Q. By Mr. Landrum: Possibly you gave it to us, sir, but in connection with your figure which you gave us, particularly with relation to Parcel 7, did you include any value therein for the leasehold interest which, I believe, the San Francisco Bridge Company had on it?

A. The value that I gave would include any leasehold interest of the San Francisco Bridge Company. I appraised it as a fee and not segregating the interests.

Q. Then, that was the entire fee interest and included any leasehold interest of the San Francisco Bridge Company?

A. Yes, sir.

Q. They also had a lease on Parcel A, did they not?

A. A very small portion.

Q. Would the same answer be true in so far as their leasehold on Parcel A is concerned; that you included whatever value that had in your figure?

A. Yes, sir.

Q. Did you include, however, anything for structures? I understood that you didn't.

A. No; I didn't include that—

Q. That is all.

A. —nor the bridge that the Tavares Company were building.

Mr. Landrum: Thank you; that is all. [207]

A. G. HOTCHKISS

called as a witness by and on behalf of the defendant National City, having been first duly sworn, was examined and testified as follows:

The Clerk: Please state your name.

The Witness: Al G. Hotchkiss.

Direct Examination

By Mr. Monroe:

Q. Where do you live, Mr. Hotchkiss?

A. In San Diego.

Q. For how long? A. 36 years.

Q. What is your business?

A. Real estate and appraiser.

Q. How long have you been in the real estate business?

A. 36 years.

Q. Generally speaking, what type of real estate have you handled in these parts?

A. Well, over the years, every kind practically. I have handled in the last several years office and industrial property and subdivision property.

Q. You are a licensed broker? A. Yes sir.

Q. You are of the firm of Hotchkiss & Anewalt?

A. Yes, sir. [208]

Q. How long has that firm been together in San Diego?

A. Since about 1929 or 1928; I have forgotten which.

Q. Have you also done appraising?

A. Yes, sir.

Q. What has been your experience and training as an appraiser?

A. Well, I am one of the California State Inheritance Tax Appraisers and have been since 1930. I am called

(Testimony of A. G. Hotchkiss)

upon in the work to appraise every type of property that is owned by individuals. I am chairman of the Appraisal Committee of the Real Estate Loan Department of the San Diego Trust & Savings Bank and a director of that institution. I am past president of the San Diego Realty Board and the California Real Estate Association and past chairman of the Appraisal Committee of San Diego Realty Board. I have been a member of that committee for many years.

Q. What type of appraising, besides that of inheritance tax appraiser, have you done during that time?

A. I have made appraisals for individuals and corporations and the federal government and for the city of San Diego and the Mesa Irrigation District and the San Diego Water Department and life insurance companies.

Q. And have you made appraisals both for the federal courts and for the state courts?

A. Yes, sir. [209]

Q. Just briefly what—

The Court: Not for the federal courts.

Mr. Monroe: That is correct, your Honor.

The Court: Federal courts do not employ appraisers.

Mr. Monroe: I should say in the federal court.

The Witness: That is what I meant, too, your Honor.

Q. By Mr. Monroe: What, generally, are your duties as Inheritance Tax Appraiser?

A. That is appraising property that a person possesses when he dies, every kind of property.

Q. And have you been continuously in the real estate business during the times you have mentioned?

A. During all of the times.

(Testimony of A. G. Hotchkiss)

Q. And have you been continuously an inheritance tax appraiser since 1930?

A. 1930; yes, sir.

Q. And have you become familiar with the property values in San Diego and its vicinity?

A. Yes, sir.

Q. Do you also do appraising throughout the county?

A. Yes, sir.

Q. And have you continued during all of this time to make studies of values throughout the county for the purpose of appraising?

A. Yes, sir. [210]

Q. Have you made any investigation with reference to the eight parcels that are involved in this proceeding?

A. Yes, sir.

Q. And I mean those parcels numbered 1 to 8 inclusive, except 4.

A. Yes, sir.

Q. And the Parcel Area A.

A. Yes, sir.

Q. And what, generally speaking, is the character of that area? I mean its physical characteristics, disregarding any structures on it.

A. It is filled tidelands, practically all of it, from its eastern boundary out say below the mean high tide line at one time.

Q. And a portion of it filled?

A. Yes, sir.

Q. For the purpose of arriving at a valuation of that property, what investigation did you make?

A. Well, I inspected the property and I checked its condition and I investigated similar properties in San Diego and talked with the Harbor Commissioner at San Diego, or the Harbor Master at San Diego, regarding similar lands in the City of San Diego and up to the

(Testimony of A. G. Hotchkiss)

boundary lines of San Diego. I have checked values in the district and checked our own office and work in that territory. [211]

Q. In arriving at a valuation, what factors did you take into consideration?

A. Well, I classified this property as industrial property. It is in the M-2 zone.

Q. What is that?

A. That is the industrial zone. It adjoins the San Diego and the Santa Fe Railway, and it also fronts on the waters of San Diego Bay. I took into consideration the growth and population of San Diego and took into consideration the fact that this particular type of land was very scarce in San Diego and vicinity and there was very little of it available. In fact, in the years that we are talking about, there was no similar land available in the City of San Diego with the exception of one or two acres and that was spoken for. That is about the extent of it.

Q. Those are the things that you considered?

A. Yes, sir.

Q. Now, did you consider in arriving at that value, in arriving at your appraisal, what the rental value of that property would be?

A. I took that into consideration.

Q. In making your appraisal, did you consider the fact that this was tideland? A. Yes, sir.

Q. And in what respects did you consider that the tide- [212] land varies from other lands?

A. It is only our tidelands in San Diego and around San Diego Bay that are adjacent to the waters of San Diego Bay and to navigation.

(Testimony of A. G. Hotchkiss)

Q. And what is the fact as to whether there are tide-lands or lands of similar character around the Bay that are actually salable on the open market?

A. There is none.

Q. In arriving at the valuation for purposes of appraisal in connection with this proceeding, did you consider, for the purpose of that appraisal, the fair market value as though it were salable?

A. Yes, sir; I did.

Q. Would there be any effect upon the market value of property of this character, assuming it salable for the sake of the question, by reason of the fact that there was no other similar property that could be bought around the Bay? [213]

A. That would make a very great difference in the salability.

Q. How about the market value?

A. And the market value, also.

Q. Now, considering all of the physical characteristics of the land and all of the things that you have mentioned, did you arrive at an opinion of the fair market value of this entire area as of November 10, 1942?

A. Yes, sir.

Q. And what, in your opinion, was the market value of the area as of that date, disregarding, for the sake of the question, the values of any structures upon the property?

Mr. Landrum: That is objected to upon the ground and for the reason that it is improper as to form, giving an improper date, and that it fails to exclude therefrom any increase by virtue of the government expenditures upon the project itself.

(Testimony of A. G. Hotchkiss)

The Court: The objection is overruled.

The Witness: May I ask you, Mr. Monroe, does that include all of the parcels, plus parcel A, in 1942?

Q. By Mr. Monroe: Yes. I am asking first as to the value of the whole area.

A. Yes, I have arrived at a value.

Q. Now, before you give that value, tell us what you consider as the market value of the property? What [214] definition do you use for that value?

A. It is that price, expressed in terms of money, that a property will bring if it is exposed to the open market, with a reasonable time given to effect a sale, and when all of the conditions and uses to which the property could be put are known to the buyer.

Q. And do you consider in that connection a willing buyer and a willing seller, neither of them acting under any compulsion? A. Yes, sir.

Q. With that definition in mind, what, in your opinion, was the market value of the entire area as of the date mentioned? A. \$655,474.

Q. Now, let me ask you this: as between that date and October 3, 1944, was there any change in the value of the property, the market value?

A. From 1942 to 1944?

Q. Yes. A. Yes, there was, in my opinion.

Q. If we would fix the value of parcel A as of October 3, 1944, what difference would that make in your appraisal? A. In the total value?

Mr. Landrum: That is objected to, if the court please, as an improper date. [215]

The Court: The objection is overruled.

The Witness: \$723,052.

(Testimony of A. G. Hotchkiss)

Mr. Crouch: What is that figure?

The Witness: \$723,052.

Q. By Mr. Monroe: That would be your total value, as you fixed the value of parcel A as of that date and of the remaining parcels as of the date in 1942; is that correct? A. Yes, sir.

Q. Mr. Hotchkiss, in arriving at that evaluation, did you consider rental values of the property?

A. I took that into consideration as one of the factors in determining the value.

Q. Was that a determining factor or simply one of the things that you considered?

A. One of the factors that I took into consideration.

Q. What did you consider as a reasonable rental value of that property as in 1942?

A. Which property, Mr. Monroe?

Q. The entire area.

A. Well, on the dry land, I broke it down in giving—in considering a rental value. My values reflect a certain rental. In other words, if I had that property—had I had that property for sale in 1942, as a real estate broker, in my opinion I could obtain the price that I have set on it. [216]

Q. That is the entire price?

A. That is the entire price.

Q. In dollars and cents? A. Yes, sir.

Q. In arriving at that price, what have you considered as to the title which would be passed in that sale?

A. A fee title.

Q. That is with all the attributes of a fee?

A. An unrestricted fee title; a fee title.

(Testimony of A. G. Hotchkiss)

Q. Now, what was the situation as of the time mentioned with reference to the tidelands around San Diego Bay, as to whether they were rented at that time or not?

A. In 1942?

Q. Yes.

A. In 1942 there was only 1½ acres left around the Bay that wasn't leased, in the city of San Diego.

Q. And did you investigate those various leases?

A. Yes, sir.

Q. Did you find that in arriving at the rental charged in dollars and cents that there were other considerations that entered into the leases, in addition to the rent?

A. I might explain that, Mr. Monroe, in this way: in fixing the rental of tideland leases in our city here, a great many other factors are taken into consideration in placing the rent. For instance, if the Harbor Department [217] decide that they want a one-cent rent, a one-cent rent for a piece of property, for a piece of tideland property, it does not apply to you and I and everybody else in the city of San Diego. In other words, there are other conditions and other considerations that they must find out before they will rent that land to you at one cent. They want to know what you are going to put on it. They want to know how much taxes they are going to derive out of what you do. They want to know what kind of a pay roll you are going to have for the City of San Diego. In other words, they want to know what our tidelands will produce for us in dollars and cents other than the rental they fix on it at the time.

Q. Now, with reference to the use of the tidelands, while they are rented, what difference, if any, is there from the standpoint of the occupant of that land in con-

(Testimony of A. G. Hotchkiss)

ducting his busienss? What factors enter into that picture?

A. Will you pardon me? Will you read the question to me?

(The question was read.)

A. I don't understand the question.

Q. I think I phrased it awkwardly. What I am trying to get at is: what difference does it make from the standpoint of organizing and conducting a business upon a piece of tideland whether the owner could buy it and receive a fee, or whether he was restricted to merely renting it from the [218] City?

A. He is restricted to renting it from the City. He can't buy it.

Q. In that case, what effect does that have on his business, and why is one more desirable than the other, if that is the fact?

A. There is this big detriment in having a lease on the tidelands of San Diego, rather than a fee title. A great many businesses, the larger businesses, must be financed, and it is impossible to get a mortgage. Our institution, for instance, would not make a loan to an individual on the real estate holdings on his improvements if they were set upon leased ground for the very obvious reason that if anything happened to it, we could not get title to the land to liquidate our debt. That is very important on the two, a title to a leasehold or a title in fee simple.

Q. Now, in making your investigation did you form an opinion as to what was the highest and best use of this property? A. Yes, sir.

(Testimony of A. G. Hotchkiss)

Q. What did you conclude in that regard?

A. Industrial property, particularly ship building and ship repairs.

Q. How about any other sort of industrial property?

A. It could be used, this particular property could be [219] used very readily in the lumber business as a terminal for unloading lumber. They used to bring lumber to San Diego on log rafts and the government has stopped that because of the danger to navigation in the rafts breaking up, and they come in now in boats. They could be unloaded there. It could be used as an oil terminal, or any business that desires and must have water and rail transportation. The rails are adjacent on the one side and water transportation on the other.

Q. What would you consider is particularly the highest and best use of the property?

A. Of this particular parcel?

Q. Yes. A. Shipbuilding and ship repair.

Q. What factors do you consider in arriving at that opinion?

A. Well, the fact that there is a demand in San Diego for that class of business, and that particular piece of property is very readily adaptable to it.

Q. Are you speaking now of its physical characteristics? A. Its physical characteristics.

Q. And you conclude from your investigation that it was peculiarly adaptable for that type of business?

A. Yes, sir, it is.

Q. What did you conclude was the reasonable rental [220] value of the property? I mean, what in dollars and cents would it reasonably produce in 1942?

A. About 1.2 per cent, which reflects about one cent a square foot.

(Testimony of A. G. Hotchkiss)

Q. Taking your market value, your overall market value for 1942, what does that work out in dollars per acre?

A. In 1942?

Q. Yes, approximately.

A. It works out to about \$436.50 an acre.

Mr. Landrum: I didn't hear that.

The Witness: About \$436.50 an acre.

Mr. Landrum: \$436.50 an acre?

A. Yes.

Q. By Mr. Monroe: I am speaking not of the rental value, but I am speaking of the market value of the fee.

A. The market value of the land?

Q. In dollars per acre, if you have that figure.

A. Yes. On my total value of \$723,000, that is, valuing the parcels in 1942 and area A in 1944, its figures \$7,493 an acre.

Q. Would you consider that there is any difference in value between September 23, 1944 and October 3, 1944?

Q. Between what dates?

Q. September 23, 1944 and October 3rd.

A. Well, it would be so small it would be practically [221] impossible to determine it.

Q. Where does this land lie with reference to the industrial tidelands of San Diego?

A. Well, just southeast of them, over the line in National City.

Q. And the destroyer base is between them?

A. The destroyer base is between them. In fact, the destroyer base comes right near the two particular lines.

Q. So that this would be the first available industrial site past the industrial sites of San Diego?

A. Yes, sir.

(Testimony of A. G. Hotchkiss)

Q. And the two cities run together?

A. Yes, sir.

Mr. Monroe: You may inquire.

Cross Examination

By Mr. Landman:

Q. Mr. Hotchkiss, you have been discussing the question of the availability of tidelands in the City of San Diego, have you not?

A. Yes, sir.

Q. Which direction is San Diego from the land with which we are here concerned?

A. North and west.

Q. What about the tidelands south, on the other side? Are there any available down there? [222]

A. Yes, but not adjacent to deep water.

Q. Now, in 1942 isn't it a fact that the City of National City had available 30 acres of land adjacent to this on the south, in 1942?

A. Yes, I think they did

Q. Why do you not consider that, in addition to your consideration of the fact that there wasn't any in San Diego?

A. Well, that is just beyond the deep water. In other words, it would be quite a little bit more expensive to go on to that.

Q. As a matter of fact, there was available a tract of 30 acres in 1942 that laid right up against this?

A. But it was impossible to do anything with it.

Q. As a matter of fact, it is impossible to do anything with most of this land without you spend some money on it?

A. That is not the reason I had in mind.

(Testimony of A. G. Hotchkiss)

Q. All right. Now, where is Chula Vista?

A. South of that.

Q. Was there anything available down there in the nature of tidelands?

A. Yes, but quite a distance away from the channel.

Q. The channel which you are referring to, is that a shallower channel?

A. No, that is a channel that has about 30 feet of water [223] in it.

Q. Well, as a matter of fact, there were tidelands available all the way down if you just stepped over the south line of this property?

A. But you couldn't use it.

Q. All right.

A. I mean you couldn't get it at the time on account of the fact that the Navy had told practically every real estate man in town they were going to take it, so it was impossible to do anything with it. I mean, in our office we did not attempt to.

Q. They had not taken it in 1942, had they?

A. They hadn't taken it, but the threat was there in 1942.

Q. As a matter of fact, the valuation you placed on this property could only be placed upon it because the government of the United States could take it in condemnation; isn't that true?

A. I placed a valuation on it as being able to be sold and owned in fee simple.

Q. Mr. Hotchkiss, you have stated to this court and jury that on account of the fact that you couldn't get a

(Testimony of A. G. Hotchkiss)

fee title to this land, that nobody could do it, that it had a greater value?

A. It did have a greater value. [224]

Q. And the only one that can do it and the only way it could be done was through the government of the United States taking it, as they are doing it here?

A. I think that is—

Mr. Monroe: Just a moment. That we will object to as argumentative and not proper cross examination, your Honor.

The Court: If the witness has examined that phase of it, he may answer.

Mr. Landrum: Mr. Hotchkiss—

The Court: Do you want him to answer?

Mr. Landrum: Yes. I thought he had.

Q. By Mr. Landrum: That is a fact, isn't it, Mr. Hotchkiss?

A. It is a fact that that is about the only agency that can take it away from the City of National City.

Q. Yes, that is right?

The Court: Wait until he finishes, counsel.

The Witness: That is right.

Q. By Mr. Landrum: That is the only agency that can take it away from National City?

A. That is my opinion.

Q. Mr. Hotchkiss, what do you consider a proper definition of fair market value?

A. I stated it a moment ago. Do you want me to state it again? [225]

Q. Yes.

A. It is that price, expressed in money, that a property would bring if exposed to the open market, with a

(Testimony of A. G. Hotchkiss)

reasonable time given to effect a sale, and all the facts about the property known.

Q. Does the element of taking it away from anybody enter into it? A. No.

Q. As a matter of fact, it includes a willing buyer and a willing seller?

A. Correct. That is another definition of it. It is that price that a willing buyer will pay who does not have to buy, and a willing seller will take who does not have to sell.

Q. You have to have a willing buyer and a willing seller?

A. That is correct.

Q. All right. Now, are you familiar with the statutes of the State of California with relation to the leases which might be made upon this property by the City of National City? A. Yes, sir.

Q. How long a lease could the City of National City have entered into for these properties on the 10th day of November, 1942, they being unimproved at that time?

A. I think a lease for 25 years, periods of 25 years.
[226]

Q. Mr. Hotchkiss, do you consider that to be the law of the State of California?

A. There is a limitation on the time you can lease it, and I am not just positive what that is right now. I did know, but I have forgotten it.

Q. Mr. Hotchkiss, you have discussed with the court and jury the question of how much better it is to have a fee title rather than to lease it, have you not?

A. Yes, sir.

(Testimony of A. G. Hotchkiss)

Q. How long could you lease it for?

A. Well, I can't tell you just the time. I think it is 25 years, with an option of 25 years; or 50 years, with an option of 50.

Q. Wouldn't it make a great deal of difference whether it was 25, with an option of 25, or 50 with an option of 50?

A. It might make some difference.

Q. Wouldn't it in your opinion?

A. Yes, sir.

Q. Will you examine the last Act, which I believe was in 1925? Now, if that provides that as to unimproved lands the City of National City could have entered into a lease for 50 years, with a provision for an extension of 50 years,—

A. That's right.

Q. —a man could have gotten a 100-year lease on this property? [227]

A. That's right.

Q. Would it have been necessary for him to buy it, then, if he could have gotten a 100-year lease?

A. It certainly would, because he couldn't hypothecate it to borrow money to run his business. That is the big difference.

Q. When the City of National City owns lands, it is off the tax rolls, isn't it?

A. The land is, yes, sir.

Q. As a matter of fact, that being true, they could lease it at a lesser rental than a private individual could have?

A. They could.

Q. Yes, sir.

A. But the improvements aren't off the tax rolls.

Q. Now, I believe you are a partner of Mr. Anewalt's, who just preceded you?

A. Yes.

(Testimony of A. G. Hotchkiss)

Q. Mr. Anewalt discussed with us a sale he said had been made. Are you familiar with the legal description of that property?

A. I can't give it offhand. I could get it for you, if you want it.

Mr. Landrum: Could he do that, your Honor please?

The Court: Is it in the court room? [228]

The Witness: I think Mr. Anewalt has it.

Mr. Landrum: I would like to have that description, your Honor.

The Court: Yes.

Q. By Mr. Landrum: Mr. Hotchkiss, will you give me the legal description of the premises which Mr. Anewalt said had been sold, and he knew of the sale?

A. Lots 1 to 18, inclusive, in block 280.

Q. Lots 1 to 18, inclusive, in block 280 of the City of National City.

A. Pardon me. Lots 1 to 10, inclusive, and lots 18 to 21, inclusive.

Q. Lots 1 to 10, inclusive, and lots 18 to 21, inclusive; that is a correct description?

A. In block 280 and block 281.

Q. And block 281? A. Yes, sir.

Q. All right. Thank you, sir. Now, with relation to this one-cent-a-square-foot rental, you said something to the effect that you broke it down, or something,—when you said that one cent a square foot was a fair rental?

A. I said one cent a square foot is a fair rental to start out with.

Q. I beg your pardon?

A. I say, to start out with that is a fair rental. [229]

(Testimony of A. G. Hotchkiss)

Q. What do you mean, to start with?

A. When the lease is made. I think all of those leases should be graduated.

Q. You mean it should be increased or decreased as the times get good or bad? A. Graduated up.

Q. Graduated up? A. Yes, sir.

Q. You wouldn't consider it might be graduated down if times got bad?

A. That has never happened here.

Q. Were you here after the other war?

A. Yes, sir.

Q. Now, do you say that one cent a square foot is a proper rental value to be reflected regardless of the depth of the land?

A. On that particular piece of land, I should say yes.

Q. To put it in plain language of the street, you think that land is worth as much as shore land?

A. Exactly as much in that particular tract, because it is all under one ownership.

Q. Well, how far back would that go?

A. May I explain that?

Q. Yes, sir.

A. If you had a business on that particular track of [230] land, and you wanted water frontage and you wanted rail frontage, and you had a boat, and you had an office, and you wanted to put that back on the back end of it, it is as important as the dock on the front or your electrical equipment might be, so I make no distinction in the value of that rental on any spot of that land from the front to the back.

Q. Now, I don't know much about the measurements. Can you tell me how far back you are going to go back

(Testimony of A. G. Hotchkiss)

here and say that land there is worth as much as that here (indicating)?

A. Yes, sir, I say that under one ownership it is worth just the same.

Q. How far back have you gone? How many feet?

A. Approximately 1400 or 1500.

Q. Mr. Hotchkiss, I believe you said you had been in the real estate business here for some 30 years?

A. Yes, sir.

Q. Do you know Mr. Ewart Goodwin?

A. Yes, sir.

Q. I will ask you to state whether or not early in the summer of 1943 you did not discuss this same problem with Mr. Goodwin.

A. Yes, sir.

Q. I will ask you if it isn't a fact,—

A. He called me and asked me what I thought the rental [231] value of that land might be.

Q. And I will ask you if it isn't a fact that at that time you agreed with him that that one cent a foot should not be reflected back more than 200 or 300 feet?

A. I did not.

Q. You did not. All right, sir.

A. I discussed that with him again, and told him I didn't say that.

Q. What did you say?

A. I said I discussed that with him afterwards, and told him that I didn't say that, or I didn't consider that.

Q. Did you and he actually discuss that phase of it?

A. You said that I did at one time. That was quite a while back.

(Testimony of A. G. Hotchkiss)

Q. I asked you if you did.

A. Mr. Goodwin said I did, and I think I did. Certainly if he said I did, I did.

Q. Now, in the figure which you have given as being your fee simple valuation, your overall valuation of the entire land with which we are concerned here, which was in the ownership of the City of National City, have you included in your figure all leasehold interests, all interests of everyone except the structures upon it?

A. Yes, sir.

Q. How much then did you consider the lease which the [232] Tavares Construction Company had on that property to be worth, separate and out of your fee value?

A. I didn't consider it.

Q. What do you mean, you didn't consider it?

A. I didn't consider it. I considered the land in fee simple without any restriction; an unrestricted value.

Q. You knew, did you not, that the Tavares Construction Company had a lease on it, or more than one lease?

A. Yes, they had a lease.

Q. Did you consider that lease added to or detracted from the value of this property in any way?

A. I didn't think it detracted from the value of it?

Q. Did it add anything to it?

A. I didn't give it any consideration in the value of the land. I put the value on that property as to what I thought I could sell the property for, if I had it to sell to a purchaser that wanted to buy it.

Q. Yes. And that lease was on there at that time?

A. That lease was on it.

(Testimony of A. G. Hotchkiss)

Q. Now, the purchaser would buy it subject to the terms and conditions of that lease, wouldn't he?

A. If it was on there at the time, he would have to, yes.

Q. You know it was on there, don't you?

A. But I tell you I appraised the property in fee [233] simple, without any restrictions.

Q. You have also appraised it for the Tavares Construction Company, haven't you? A. Yes, sir.

Q. You did know, then, they had a lease on here, didn't you?

A. Yes, I knew they had a lease on here, but didn't take it into consideration in arriving at the value I gave.

Q. How long a lease was that?

A. Will you let me get some more papers, sir?

The lease was entered into on January 1, 1942, and it is my understanding it ran for 25 years.

Q. Yes, sir. A 25-year lease? A. Yes, sir.

Q. What were they going to pay for it?

Mr. Monroe: Now, if your Honor please, we will object to that as not proper cross examination.

The Court: Overruled.

The Witness: One cent a square foot.

Q. By Mr. Landrum: One cent a square foot. Then it is true, is it not, that as to that parcel of land its income was fixed for a period of 25 years, wasn't it?

A. Yes, sir.

Q. And it was fixed before 1944, wasn't it?

A. Yes, sir. [234]

Q. It was fixed on January 1, 1942, wasn't it?

A. Yes, sir.

(Testimony of A. G. Hotchkiss)

Q. Now, let me ask you this question: did the Tavares Construction Company have a lease on any portion of parcel A? A. At that time?

Q. Yes, sir, in 1942. A. No, sir.

Q. Did they ever have a lease on it?

A. No, sir.

Q. Who had a lease on it?

A. A portion of it was leased to the San Francisco Bridge Company. They had a lease on it.

Q. What rental did they pay for that land covered by water?

A. Well, that lease commenced on January 1, 1941 and ended December 31, 1950, with an option of renewal for an additional ten years. They paid \$10 a month for the first ten years, and \$50 a month for the last ten years. They agreed also to do certain dredging. There was no time limit mentioned in the lease as to when the dredging might be done. I had no knowledge of whether they ever did it or not, so I gave no value to that.

Q. Now, to get those terms in my mind, I want to ask you: for how long was it \$10 a month? [235]

A. Ten years.

Q. How many acres did that include? How many acres did they get for \$10 a month?

A. They got that parcel there at the elbow.

Q. Would it be this (indicating)?

A. Down below.

Q. The bridge company had a lease on parcel 7, and is it then fair to say that that portion of parcel A which lies to the south where I am running this pencil on Exhibit 1 is what they had a lease on? Is that about right?

A. I am sorry, but I don't have the exact area.

(Testimony of A. G. Hotchkiss)

Q. Counsel has just informed me it was a fraction over 8 acres, and I will assume that to be true. You think that is about right?

A. I think it is right. I don't have the exact acreage.

Q. And you say it is a 25-year lease, or, a 10-year lease?

A. It is a 10-year lease, with an option on another 10 years.

Q. With an option of 10 years further. So the income from parcel A, the 8 acres of it, was fixed for a period of 20 years, was it not?

A. Yes, but not at \$10.

Q. No, we will take it at \$50. [236]

A. And not at \$50.

Q. What was it?

A. Plus certain work that was to be done that National City would eventually get the benefit of, and that is indeterminable. I don't know what that work would cost. There is such a variation in the valuation of dredging, it is practically impossible to place that value on it.

Q. Mr. Hotchkiss, of course, the price at which a piece of land would sell would be influenced somewhat by the amount of income which might be derived from a lease on it; isn't that correct?

A. If that was a property rental, yes.

Q. But you do use it, don't you, as a check?

A. We use it for a check, but may I say one other thing regarding that, the different factors you take into consideration in value. A piece of property at a rental might figure out a certain amount of money. By comparing it with other sales, it might figure out at a certain amount of money, and in reproduction cost it might figure

(Testimony of A. G. Hotchkiss)

out at a certain amount of money, and adding them all together it might figure out at a certain amount of money and still might not sell for anything like it. And the only way you can tell that is to have been in the business and know what property will sell for and what its actual value is.

Q. What I am thinking of is, if a man had a piece of [237] property leased at \$10, and he had a \$10 rental on the property for a period of 20 years, he couldn't sell it for much, could he?

A. I wouldn't say. It would depend upon what the other conditions of the lease were. As I said before, the money consideration isn't the only consideration in making long leases.

Q. Now, let's take a case, then, where the money consideration is the only consideration.

A. Then it has a bearing.

Q. That is right? A. Yes, sir.

Q. And you know you don't up the price any when the income is already fixed?

A. No, if the income is all that is taken into consideration.

Mr. Landrum: That is right. Thank you, sir. That is all.

(Witness excused).

The Court: Call another witness.

Mr. Monroe: Mr. Mueller.

You intend to run to 5:00 o'clock, do you, your Honor?

The Court: I propose to, yes. [238]

EDWIN A. MUELLER,

called as a witness by and on behalf of the defendant National City, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: Will you state your name, please?

The Witness: Edwin A. Mueller, M-u-e-l-l-e-r. By Mr. Monroe:

Q. Where do you live, Mr. Mueller?

A. San Diego.

Q. For how long?

A. I have lived in San Diego since 1913.

Q. And what is your business?

A. I am a State inheritance tax appraiser.

Q. Are you also in the real estate business?

A. No, not at the present time. I devote my time exclusively to appraisal work.

Q. Prior to becoming an inheritance tax appraiser, you were in the real estate business? A. I was.

Q. And a licensed broker? A. I was.

Q. How long have you been an inheritance tax appraiser? A. Since 1931.

Q. You are one of the three inheritance tax appraisers [239] in San Diego County? A. I am.

Q. Have you done other work of appraising?

A. Yes, I have done extensive other work as an appraiser. I have been employed by the California Insurance Department, the California Corporation Department, the California Highway Department, the State Board of Equalization of the State of California, the California Securities Commission, the Attorney General of the State of California, the State Controller. I have been employed

(Testimony of Edwin A. Mueller)

by the Federal Bankruptcy Courts. I was employed by the United States Government to appraise a federal housing project at 47th and Market Streets, for condemnation, although no trial was ever had. I was also employed by the United States Government to appraise what is now Camp Lockett, formerly the Campo Ranch, for the United States Government for condemnation, although no trial was ever necessary.

During the past two years, and within the past year, as a matter of fact, I appraised the entire Warner Ranch, consisting of 46,000 acres, for the California Securities Commission; also, all of the lands embraced in the Vista Irrigation District. During the past two years I made an appraisal of the property of the Mendenhall Cattle Company, comprising approximately 12,000 acres. I have been employed as an appraiser by the San Diego Gas & Electric Company, [240] by the Solar Aircraft Corporation, by the F. T. Scripps Corporation. Some of the industrial appraisals that I made were, for example, the assets, including machinery and real property, of the California Electric Company. In 1942, in collaboration with Mr. George Schmutz, and others, I made an appraisal of the storage yard and the buildings and equipment of the San Diego Gas & Electric Company. I made an appraisal in 1944 of all of the assets of the Standard Furniture Company on Kettner Boulevard, a part of which is commercial property. I made an appraisal in the year 1945 of certain commercial and industrial property belonging to the Ace Van & Storage Company. I made an appraisal in 1944 of the assets, including the leasehold plant, facilities, and machinery, and so forth, of the American Fisheries Company, which is a corporation operating on the San

(Testimony of Edwin A. Mueller)

Diego municipal tidelands. In 1944 I appraised the assets of Hills & Bouchey, a construction company. In 1946 I appraised certain industrial lands located in Chula Vista, at the harbor site industrial district, belonging to Jaekel & Rogers, a partnership. I made an appraisal of the Shelltown Auto Court, which later became a part of the United States destroyer base. I made an appraisal in 1946 of the plant, equipment and machinery of the Serv-All Company, which is a manufacturing and machining company located in Chula Vista. [241]

Q. Now, as a result of this experience have you become familiar generally with the values of real property in and about the County of San Diego? A. I have.

Q. Have you made an investigation as to the property which is the subject-matter of this suit, for the purpose of ascertaining its fair market value?

A. I have. As a matter of fact, I have been more or less directly or indirectly connected with this property for a great many years because, as a member of the California legislature, in 1923 I was the author of the Act or the bill which granted these tidelands to the City of National City; and I was also the author of the bill which amended that Act to extend the leasing period to 50 years in 1925. [242]

At that time I was also the author of the Act which granted the tidelands to the City of Coronado. Also, of an act which enlarged and amplified the grant of the tidelands to the City of San Diego. I was the original author of the Mission Bay State Park bill, which was passed and which was a law.

Q. Now, with reference to this particular tract of land in suit, tell us generally what knowledge you have of

(Testimony of Edwin A. Mueller)

it, and what investigation in a general way you made for the purpose of ascertaining its value.

A. Well, first of all, I took into consideration the primary things about the land, such as its area, its location, the type of soil, the existing improvements, if any, the utilities available, the railroad facilities available, the general uses to which it could be put, the availability of competitive sites, the need for industrial sites. I made an investigation of the City of San Diego tideland leases. In fact, I made a very exhaustive investigation of them from the standpoint of ascertaining whether or not there was any necessity for developing additional tidelands. I made an investigation of the rates charged on tideland leases, not only in National City, such as there were, but also in the City of San Diego, and I also discussed with Mr. Brennan, the Harbor Master of San Diego, the question of whether or not the rental fixed in the leases represented the entire considera-[243] tion. Those are a part of the things which I did and took into consideration.

Q. Did you also make some investigation as to sales of property?

A. Yes, I made an investigation of as many sales as I could find.

Q. Now, in that connection were there any such things as sales of tidelands?

A. No, there are no sales of tidelands. They could not be sold under the law of California.

Q. And any sales of property that had frontage on the water extending out to the bulkhead line?

A. There were no such sales. I want to amend my last statement, however, that no property considered tidelands under the constitution of the State, which is within

(Testimony of Edwin A. Mueller)

two miles of any incorporated area, can be sold, and this property particularly could not be sold. It so stated in the Act.

Q. Now, in arriving at evaluations of that property, what different factors did you consider?

A. I think I have cited a great many of them. I want to add that I made an investigation particularly from the standpoint of the need for additional industrial area, and I made an analysis of the conditions as they existed from 1940 to 1944. I found, for instance, that, according to the Bureau [244] of the Census, and as to 1944 according to the official OPA estimates, San Diego County had a population of 289,000 people—I am dropping the odd hundreds—in 1940, and 505,000 people in 1944. I found that persons gainfully employed—

Mr. Landrum: If your Honor please, I do not like to interrupt, but I am perfectly willing to admit this witness's qualifications. I do not want to interrupt, but it seems that we are going rather far afield with relation to the investigation of this situation.

The Court: I think we ought to curtail it, in view of the concession of the government that the witness is qualified.

Mr. Monroe: Well, I am trying to get at the various factors which he considered in valuing it, not so much from the standpoint of his qualifications. I think he has given that, but from the standpoint of those factors which he considered in arriving at the value—

The Court: He might epitomize it as much as he can, in justice to himself.

Q. By Mr. Monroe: Then let me ask you another question: Mr. Mueller, starting with the question of the

(Testimony of Edwin A. Mueller)

nature and character of the property, and its soil, and the way it lies, as you have mentioned, what did you find in that connection? [245]

A. Well, I found—to save time, I found the same situation as the witnesses ahead of me have testified to, that certain areas had an elevation of eight to 12 feet, whereas Area A, which is the overflowed land in 1942 had had some dredging done, and in 1944 had approximately 18 acres fully dredged.

Q. Did you arrive at a conclusion as to what the land was best fitted for? A. I did.

Q. What do you consider as its highest and best use?

A. I wouldn't put any single use on that land. I think its highest and best use is for industrial developments similar to the water front of the City of San Diego, for canneries—they are bunched side by side, some of them with frontages of only 150 feet, but there are canneries, there are lumber processing companies, lumber yards, there are boat repair works and shipbuilding works. I can go through the whole list here and cite a dozen uses.

Q. Well, without perhaps going into that, Mr. Mueller, would you say generally that it was any of the industrial uses which require water front facilities?

A. That is correct.

Q. In that connection is there or is there not a material element in having a fairly large contiguous or solid piece of property? [246]

A. Yes, that is certainly a very material factor, and it is illustrated—not that this is the only case where that would apply, but it is illustrated by the very situation of the Concrete Ship Constructors. They could not have operated on five acres. Consequently, the fact that you

(Testimony of Edwin A. Mueller)

have a large parcel certainly adds to the value of the composite package, as you might say. That is called an added plottage value, and it is demonstrated in the case of the present use, although I can cite other examples.

Q. Is it true with respect to that that for industrial purposes or large-area industries that an added value is occasioned by reason of a larger acreage? A. Yes.

Q. Now, in arriving at your values of the property, do you consider it as a fee title? A. Yes.

Q. Do you consider it as salable for the purpose of the question at the time of the taking?

A. I have been so instructed, that we must consider it salable. Otherwise we could not set a value except on the use to the owner, which is not permitted. So I so consider it.

Q. Taking into consideration, Mr. Mueller, all of the factors which you have considered, did you arrive at a valuation of the entire parcel as of November 10, 1942?

[247] A. I did, yes.

Q. In arriving at that valuation, what valuation did you seek to put upon it? I mean, did you use market value?

A. You mean you would like to have me define market value?

Q. Well, I want to know first if you used it as your basis. A. I did, yes.

Q. Now, give your definition of market value.

A. Market value is the highest price, expressed in terms of money, which a piece of property will bring if exposed to sale on the open market by a seller who is not compelled to sell to a buyer who is not compelled to buy, both parties having full knowledge of all of the uses to

(Testimony of Edwin A. Mueller)

which the property is adapted, and with a reasonable length of time to make the sale.

Q. Using that market value which you have defined as the test, what, in your opinion, was the market value of the entire subject parcel, eliminating therefrom this Parcel 4 as of November 10, 1942?

Mr. Landrum: That is objected to, if your Honor please. It is objectionable as to form, in that it includes within itself an increase or an increment in the value due to the work which had been done upon it prior to that time.

The Court: The objection is overruled. [248]

The Witness: I have arrived at a value. May I explain my answer, your Honor?

The Court: I would prefer to have you answer it, and then if you want to explain it later on, you may do so.

The Witness: The answer is \$617,900 for the land in 1942, without regard to improvements; and \$685,000 for the land in 1942, but taking Area A in 1944, as its condition then existed.

The Court: He didn't ask that, but I think that is a short circuit. He would ask it and I suppose the government will object to it?

Mr. Landrum: Yes, your Honor.

The Court: So we will overrule the objection and permit the answer to stand.

Q. By Mr. Monroe: Now, you were about to explain that answer. What explanation do you have?

A. I explained it in my answer.

Q. You have explained it? A. Yes. sir.

Q. Now, as I understand it, in arriving at those values you have eliminated any question of the value of

(Testimony of Edwin A. Mueller)

the structures that were placed on the property?

A. That is correct.

Q. So that it is merely for the land itself?

A. That is correct. [249]

Q. Now, you have given an increased value of area A as of October 1944; is that correct? A. Yes.

Q. What factors do you consider as bringing about that increase in value?

A. The increase in value was occasioned by the fact that certain dredging had been done and that the property had a higher utility.

Q. Was there also considered any general increase of market values in property in San Diego?

A. There was a very definite increase, in my opinion, in the market values between 1942 and 1944.

Q. And would that increase affect this entire property? A. In my opinion, it would.

Mr. Monroe: You may inquire.

The Court: I believe we will have the cross examination in the morning.

Mr. Landrum: Whatever your Honor wishes.

The Court: Ladies and gentlemen, we will take a recess until half-past 9:00 in the morning; half-past 9:00 and not 10:00 o'clock. Remember the admonition and keep its terms inviolate. [250]

(The following proceedings were had outside of the presence of the jury:)

The Court: All jurors will leave the court room. I think the record may show now they are all out.

Mr. Monroe: The defendant National City offers to prove by the testimony of the three witnesses last on the stand that, as of October 2, 1944, the market value of the subject property, the entire tract taken as a whole, had increased approximately 50 per cent over and above the values that were given as of 1942, basing this offer, your Honor, upon the theory that the actual taking of the property was in October, 1944, and that the original use of which this property was sought to be taken, was, by the condemnation action started, abandoned, and that, in 1944, by the determination of the government authorities, they knew a different use was determined upon.

Mr. Landrum: The offer is objected to upon the ground and for the reason it is improper in form; second, that it assumes an improper date of valuation; third, that it includes within itself an increase and element in the value of this property due to the very work the government itself has done there and the expenditures of government money prior to that time.

The Court: It will all be disallowed.

Mr. John M. Martin: If the court please, I was going to ask the question as to whether it did include such. The offer [251] of proof is not clear to me, whether it is based on enhanced value or the value of the improvements placed.

Mr. Monroe: It is not on the value of improvements placed.

Mr. John M. Martin: Very well.

The Court: We will take a recess until 9:30 tomorrow morning.

(Thereupon, at 5:00 o'clock p. m., a recess was taken to 9:30 o'clock a.m., Wednesday, February 19, 1947.)

San Diego, California, Wednesday, February 19, 1947.

9:30 A. M.

The Court: All present. Proceed.

EDWIN A. MUELLER,

called as a witness by and on behalf of the defendant National City, having been previously sworn, resumed the stand and testified further as follows:

Cross Examination

By. Mr. Landrum:

Q. Mr. Monroe, I believe that on yesterday on direct examination you discussed with us the question of whether or not property in a larger parcel or a large parcel might sell to greater advantage or for more money than were that same parcel divided up into smaller parcels. You did discuss that? A. Yes.

Q. And I believe you used the word plottage value, didn't you? A. Yes, I did, I believe.

Q. What is plottage value?

A. Plottage value is the advantage that a larger parcel or an assembly of parcels has over individual parcels.

Q. What you mean by plottage value is that if someone wanted a parcel of land of, say, 100 acres, you would plot it into a larger parcel by acquiring the smaller parcels? [254] A. That is right.

Q. So it is your opinion, as I understand it, that a larger parcel of land such as this would sell for a greater value than were it divided up into smaller parcels and sold as such?

A. Yes, it is, although I did not ascribe any greater value to this parcel for that reason.

(Testimony of Edwin A. Mueller)

Q. That is what I was trying to get at. As a matter of fact, it is entirely probable that you find buyers easier for smaller parcels and get more money than you would for larger parcels?

A. Yes, and that proves exactly what I mean by plot-tage, because when you have smaller parcels and you start to gather up—for instance, I happen to know when they were gathering parcels for Consolidated, they might gather up 10 parcels and by that time the owners of the next 10 had notice that someone was in the market, trying to acquire property for some purpose or other, and they immediately raised their price, so their overall average was, therefore, increased.

Q. But let us assume we might have a buyer for a little piece like the Johnson piece, do you think he might be interested in the larger piece?

A. I couldn't argue at all that there aren't more customers for smaller parcels than there are for larger pieces. Well, certainly we can agree to that. [255-6]

Q. By Mr. Landrum: Now, of course, in arriving at your conclusion with relation to the fair market value of this property, you knew and realized that the San Francisco Bridge Company had a lease from the City of National City covering what I am now pointing to on Plaintiff's Exhibit No. 1 as Parcel 7?

A. Yes; I did.

Q. And, also, that the San Francisco Bridge Company had a lease from the City of National City covering that portion of Parcel A to which I am now pointing, and comprising, as I understand it, approximately eight acres? You knew that, didn't you? A. Yes.

(Testimony of Edwin A. Mueller)

Q. State whether or not, in your opinion, the fact that the San Francisco Bridge Company had such a lease detracted from or added to the value of the whole as you fixed it.

A. My answer is that I appraised the entire property regardless of the lease.

Q. Then, you gave no consideration, in so far as dollars and cents are concerned, to the lease of the San Francisco Bridge Company?

A. Oh, yes; I made an investigation of the lease and studied it but, when I made my appraisal of that property, I included the lease as well as the fee to the land. [257]

Q. How much did you include by virtue of the fact that they had that lease in there or how much did you detract from your value?

A. I neither included nor detracted anything from my value because, by the terms of the lease, it still is not determined, as far as I can see, what the consideration was for the lease.

Q. Calling your attention now, again, to Parcel 7 as depicted on Plaintiff's Exhibit No. 1, by the giving of that lease to the San Francisco Bridge Company, the City of National City actually severed, in so far as this back land is concerned, that back land from the water, didn't it?

A. No; I don't agree to that.

Q. Well, come and look at it on this map with me.

A. I would agree with you if they had given the San Francisco Bridge Company Parcel 2 up to the property line and Parcel 7 down to the pier head line, so that they would have been completely blocked off from the water.

Q. Then, as I understand it, you say that you did not consider that as being detrimental to the back land by

(Testimony of Edwin A. Mueller)

reason of the fact that a person owning Parcel 2 or owning Parcel 3 might get out to the water up here or down here?

A. I didn't consider it as detrimental—I didn't give it any consideration because I appraised the fee.

Q. But it is a fact, is it not—just come here a [258] moment, please—it is a fact, is it not, that, should someone desire to purchase what is designated on Plaintiff's Exhibit No. 1 as Parcel 2, they would have no access to the water whatsoever because of the fact they couldn't get across that San Francisco Bridge Company's lease?

A. If you carve Parcel 2 out alone, that would probably be the fact.

Q. And as to Parcel 2, Parcel 6 and Parcel 3, they would have to come into the water either through this way or proceed down this way on Parcel 3?

A. I want to again repeat that the property was all in one ownership and I so considered it.

Q. Now, in arriving at your conclusion with relation to the fair market value of this property, I take it that you made a complete investigation of the sales of property which you considered comparable in that locality?

A. I made an investigation of sales of property in the industrial area of San Diego and National City and I made a very careful study of leases, tideland leases.

Q. Let's discuss that situation just a moment. Is it your opinion that here in the City of San Diego you find in this situation as it exists here sales that are comparable to the sale of this land in the City of National City?

A. May I have that question again?

(Testimony of Edwin A. Mueller)

(Question read by reporter.) [259]

A. When you use the present tense, do you mean as of the date of taking?

Q. Yes, sir. Just answer me yes or no, please

A. My answer is yes, subject to this explanation—

Q. That is right.

A. My explanation is this, that, between 1940 and 1944, San Diego grew industrially more than it grew in its entire 80 years of life as a pueblo and a city before that; that the impact had not hit National City and beyond there until 1942, which was starting to strike then, and hadn't completely struck until 1944.

Q. What made it strike?

A. Why, the necessity for additional industrial sites.

Q. The necessity of the government of the United States?

A. No. Now, just a minute; I did not state that.

Q. I know you didn't. I asked you that, sir.

A. No, sir. [260]

Q. All right. Thank you. Now, of course, in your investigation you knew of and did thoroughly investigate the sale which Mr. Anewalt and Mr. Hotchkiss gave us from that witness stand on yesterday, didn't you?

A. I knew of the sale, but I didn't give it a great deal of weight as connected with this, because it is entirely different type of property. This is water-front property. It has access to the water. The other doesn't have. It is entirely different.

Q. As a matter of fact, isn't it a fact that when they talked about that sale, they gave us a sale of improved

(Testimony of Edwin A. Mueller)

property with buildings and warehouses and brick buildings upon it?

A. Well, I didn't—I wasn't listening particularly to what they gave you. They gave you a sale of certain property down there. I have the sale down here in my list.

Q. All right. You have that sale in your list. Calling your attention to lots 1 to 10, inclusive, and lots 18 to 21, inclusive, in block 280 and all of block 281 in the City of National City, did you have knowledge of and did you take into consideration the sale of that property by the San Diego and Arizona Eastern Railway Company to the Plywood Structures, Inc., under date of April 1, 1942?

A. My answer is yes, I had knowledge of it. I took it into consideration. I gave it no weight as compared to this [261] property.

Q. How much did they pay for it?

A. According to my records, \$33,000.

Q. In 1942? A. April 1, 1942.

Q. Are you positive of that, sir?

A. That is my record.

Q. Isn't it a fact that they paid \$3,000?

A. No. I secured this information from Mr. Anewalt. I gave no weight to the sale anyway.

Q. Now, I don't want to confuse you. The valuation which Mr. Anewalt gave was a sale in 1944, wasn't it?

A. That may be true.

Q. Check again and see if you have that 1942 sale, please, sir.

A. I have a sale of that particular piece of property at \$33,000.

(Testimony of Edwin A. Mueller)

Q. Do you have one on April 1, 1942?

A. This is the one that I have ascribed to April 1, 1942.

Q. All right. We will check it. Thank you, sir. Now, what is the date of that sale again that you have there? April 1, 1942?

A. That's right.

Q. Are you positive that the date of that sale is not [262] the 13th day of April, 1944?

A. No, I am not.

Q. You are not positive?

A. There might have been a subsequent sale.

Q. Mr. Mueller, do you have an opinion of the market value of the lands with which we are here concerned, known as the National City lands, as of August 27, 1942, for all uses for which it was on that day suitable or adaptable, but not including therein any increase or increment in that value due to work done before that in the construction of this shipyard project? A. I do.

Q. And what is your opinion of that value?

A. \$617,900.

Q. I will ask you to state whether or not prior to the 27th day of August, 1942 changes had been made, particularly in connection with dredging and leveling of the land, which were not there when this land was in the ownership of the City of National City.

A. The answer is no, subject to this qualification: the land was, as I understand it, in the ownership of National City right up to November 10, 1942. Now, much of that work had been done up to November 10, 1942.

Q. That is right, but I fear you did not understand my question. The question, as I put it to you, was

(Testimony of Edwin A. Mueller)

[263] this: do you have an opinion of the fair market value of the land with which we are here concerned, known as the lands of the City of National City, as of August 27, 1942, for all uses for which, in your opinion, it was suitable and adaptable, leaving out of your figure, however, any increase or increment in that land due to work, dredging, leveling, and so forth, which had been done on there prior to that time as a part of this very project?

A. Yes, that is the figure that I just cited to you a few moments ago.

Q. In other words, you did not include anything for work that had already been done?

A. No, sir, I did not.

Q. That is what I want clear. So what you have given us is your opinion of the fair market value of this land as it stood on August 17, 1942, leaving out of consideration, however, any work that had been done by expenditure of money on it by persons other than the City of National City.

A. That is correct.

Q. That is right. Now, should I ask you that same question with relation to the valuation which you have given us as of the 23rd day of December, 1944, or as of the 3rd day of October, 1944, would your answer be the same?

A. No. [264]

Q. All right.

A. And for this reason: I made no appraisal, as far as the City of National City is concerned, except on the date of the taking by the government of those parcels, all parcels except area A. Area A was taken subsequent to the other parcels, so I would have a different opinion of the value of area A.

(Testimony of Edwin A. Mueller)

Q. All right. Now, I want to clear that up. Then, as I understand your answer to the question, in so far as parcel A is concerned, assuming and accepting the date of October 3, 1944, or assuming and accepting the date of December 23, 1944, you have included within your value there an increase in the value of that property due to the construction of this shipyard itself; is that right?

A. No.

Q. Then explain to me what you meant when you said you did.

A. I testified yesterday as to two figures. The first figure was \$617,900, and the second figure was \$685,299. The difference was occasioned by the change in the character of area A.

Q. What brought about that change in the character of area A? A. The dredging.

Q. The dredging? [265] A. Yes, sir.

Q. How much have you included in your figure, your larger figure which you have given us, by reason of the dredging and the work which had been done on it in the construction of this shipyard?

A. Now, just a minute. Let's understand one another. I am not talking about the construction of the shipyard. I disregarded that entirely. I am talking exclusively about the dredging in area A.

Q. Well, the dredging of area A was a part of the construction of this shipyard? A. But not all.

Q. But a part of it; that is right, isn't it?

A. No, not even part of it. Some dredging was done by people other than the Concrete Shipbuilders and other than the United States Government.

(Testimony of Edwin A. Mueller)

Q. All right. Let's get down to this: Have you included anything in there by virtue of the dredging which was done by the Concrete Shipbuilders and the United States of America?

A. Again, going back to my testimony of yesterday, I gave a figure of the property value without regard to any improvements put on by Concrete Ship or by the Government of the United States, and I gave a figure, taking into consideration the dredging that was done by the Government of [266] the United States or Concrete Shipbuilders, and my figure including the dredging was \$685,000.

Q. How much is it excluding that dredging?

A. \$617,000; the difference.

Q. Now, in 1944? A. Yes.

Q. All right. Then we get it clear. The difference between your figure of \$617,000 and your figure of \$685,000 as of 1944 is brought about and is constituted by virtue of the fact that those moneys were expended upon it in the construction of this shipyard; that is right, isn't it? A. Yes.

Q. Do you in your answer give to the owner of this property, the City of National City, the benefit of the moneys spent on there in that dredging?

A. I do not. [267]

Q. Well, I don't understand you. Why did you add it in there, then?

A. Because I was asked the question to estimate the condition of the land in 1944 as dredged and I was also asked to ascertain its condition without the dredging, and I prepared the two answers in anticipation of that.

(Testimony of Edwin A. Mueller)

Q. Is this fair, that the difference between your two figures, 617,000 and 685,000, is by virtue of that dredging that was done by the Concrete Ships?

A. Yes; that is right.

Q. Is that the same figure that you gave us for a 1942 valuation?

A. No.

Q. What figure did you give us for this over-all valuation of all of it in your 1942 valuation?

A. \$617,000.

Q. That is the same figure, isn't it?

A. That is right.

Q. Is it your opinion that there had been no increase in land values in that locality which were reflected in this property between 1942 and 1944?

A. It is my opinion that there was a very definite increase in land values but I did not describe any increase in the value of Area A as between 1942 and 1944 because, in 1942, Area A was in a comparatively unuseable condition and it was [268] made useable by the dredging in that interval of time.

Q. As a matter of fact, the value that was reflected in Area A is almost solely due to the money that was spent in there in constructing this shipyard, isn't it?

A. That is all I allowed, in an effort to be perfectly fair with the government.

Q. That is right. Thank you, sir. That is all.

Redirect Examination

By Mr. Monroe:

Q. You have been asked about a sale on April 1, 1942. What data do you have on that sale?

A. I have—

(Testimony of Edwin A. Mueller)

Mr Landrum: That is objected to, if the court please. The witness has already stated that he had no data on that sale.

The Court: I don't know whether he meant to be understood that way or not.

The Witness: I have some data on this sale but, apparently, it is confused as between two sales, the one a sale and a resale.

Q. By Mr. Monroe: What sale was it in 1942 that you were speaking of, April 1, 1942?

A. That was, as I understood it, the sale from the Plywood Corporation—or a sale from the San Diego, Arizona & Eastern Railway to the Plywood Structures. [269]

Q. And what property was that?

A. That was a portion of the block bounded by 24th and 25th Streets and Harrison and Cleveland Avenues in National City.

Q. And how big a piece would that be?

A. 50,000 square feet approximately; over 50,275 square feet.

Q. And that was how much money?

A. My record is \$33,000.

Q. Where is that located with reference to this property? A. I would say within a quarter of a mile.

Q. Is it water front property?

A. No; it is not.

Q. Does it have access to the Bay at all?

A. It has not.

Q. Is it, in your opinion, comparable to the type of property involved in this suit?

A. No; it is not.

(Testimony of Edwin A. Mueller)

Q. Mr. Mueller, there have been a number of questions asked you about the situation as to the lease of a portion of this property. In arriving at your conclusions, did you consider this as one parcel of land?

A. I considered it absolutely as one parcel of land, in one ownership. [270]

Q. And as passing to one purchaser?

A. That is correct.

Q. In making estimates of the value of a leasehold in such cases as you do make estimates of such values, what do you consider as furnishing any particular value to the leasehold?

A. I am disregarding any question of improvement—

Mr. Landrum: That is objected to, if the court please, upon the ground it is not proper redirect examination.

Mr. Monroe: There have been a lot of questions asked about how that affected the value of this property, and I want to show—

The Court: I think perhaps, technically speaking, it is not redirect examination but I will permit counsel to interrogate the witness about it. Overruled.

The Witness: I am sorry but I don't understand your question.

Q. By Mr. Monroe: Let me reframe it, Mr. Mueller. In considering values of a leasehold as separate from the value of the interest of the owner, if the rental payment is the full rental value, do you consider that has any particular bonus value? A. No; I do not.

Q. And it is only when the lease calls for a rental less than the rental value that it does have a bonus [271] value? A. That is correct.

(Testimony of Edwin A. Mueller)

Q. When, however, you sell both the interest of the landlord and the interest of the tenant in one sale, is the sum of the value of the owner's interest and the value of the tenant's interest still the reasonable market value of the property? A. It is.

Q. So that, when they are both sold together, it makes no difference?

A. The only problem there is as to how much the tenant or the lessee is entitled to and how much the owner is. But it is all included in the one figure.

Q. The two of them can't make more than the one figure? A. That is correct.

Mr. Monroe: That is all.

Recross Examination

By Mr. Landrum:

Q. How much did you put in, then, for the lessee, the San Francisco Bridge Company?

A. I didn't put any value in for the lessee. I didn't estimate it because I estimated the value of the fee, and I included within the whole in that case all of its parts.

Q. Then, as we understand it, you reached a conclusion that, in so far as the San Francisco Bridge Company was concerned, it had no bonus value and it couldn't be sold for any bonus more than they were paying, is that it? A. No, sir.

Q. Why not?

A. Because I appraised the fee of the land, which includes all of its parts.

Mr. Landrum: That is all.

Mr. Monroe: That, your Honor, is all the testimony we care to introduce at this time.

The Court: Ladies and gentlemen, it may be that some of you feel that you should make notes or keep track of the figures given. You are permitted to do that, if you desire, but you must keep the notes to yourselves individually and for your own convenience. I apprehend, without knowing it, that counsel in their summation at the conclusion of the case will prepare diagrams which will illustrate these various items and the various estimates which have been given by the various expert witnesses, and that you will have the benefit of that. But, if you desire, in addition, to make your own notes, you may do so. But that should be confined, however, to figures and should be kept by the individual jurors, and not any explanatory statement that is not pertinent to that. In other words, we have a record here that shows what took place and we must accept the official record of what has taken place. Proceed, gentlemen, for the San Francisco Bridge Company. [273]

Mr. Sloane: May I make a short opening statement, your Honor?

The Court: Yes; you may.

Mr. Sloane: If your Honor please, and ladies and gentlemen of the jury, this piece of land down here is at the south end of the Bay. As you have had demonstrated here, the San Francisco Bridge Company is interested only in Parcel 7 on the shore, the area in blue, and in part of Parcel A, the water area, which is included in the extended lines of its boundaries, that is, a slightly squashed parallelogram of water, which the evidence will show contains about eight acres, or a total of almost 14 acres of land and water.

We will, with the permission of the court, put in the lease in evidence and give you some definite details on

these matters that have been alluded to but are not clearly before you as yet.

We seek to keep ourselves as free from involvement as possible in these larger or questionable matters as to overall values, confining ourselves to what the San Francisco Bridge Company had in November, 1942, which was an unexpired lease under which they could retain the property for an ensuing period of 18 years. In other words, I am talking to you now and my witnesses will talk to you merely about an 18-year right of occupancy in this area, Parcel 7 and the south-easterly corner of Parcel A. I will call Mr. Hinds. [274]

BARRETT G. HINDS

called as a witness by and on behalf of the defendant San Francisco Bridge Company, having been first duly sworn, was examined and testified as follows:

The Clerk: Please state your name.

The Witness: Barrett G. Hinds.

Direct Examination

By Mr. Sloane:

Q. Mr. Hinds, are you connected with the San Francisco Bridge Company, one of the defendants in this action? A. I am.

Q. In what capacity?

A. I am the president of the company.

Q. How long have you been connected with the company? A. Since the fall of 1923.

Q. Has the company done work in and about San Diego Bay in the past? A. Yes.

(Testimony of Barrett G. Hindes)

Q. Over what period?

A. Off and on during the entire time or period of my employment by them and prior to that time say for a period of 30 years.

Mr. Sloane: In order to pictorially show what part the San Francisco Bridge Company has had in the development of San Diego Bay, as well as to illustrate the particular [275] area, I offer in evidence United States West Coast of California Chart of San Diego Bay, being the edition of July, 1942, according to the inscription thereon.

Mr. Landrum: There is no objection to it when I get a number for it, your Honor, for my records.

The Clerk: San Francisco Bridge Company's Exhibit K.

Mr. Landrum: Could I ask what letter or number you gave it?

The Clerk: Exhibit K.

The Court: It will be received and so marked.

(The document referred to was received in evidence and marked defendant San Francisco Bridge Company's Exhibit K.)

[Defendants' Exhibit K—Map. See original.]

Q. By Mr. Sloane: Are you familiar with this chart which has been marked Exhibit K? A. I am.

Q. And, in a general way, what does it depict?

A. It depicts an indication of the Harbor of San Diego, with the land areas and the water areas, together with the depths of water in such areas.

(Testimony of Barrett G. Hindes)

Q. As of what date?

A. As of about the middle of 1942. I think the month is stated on there.

Q. Was the San Francisco Bridge Company engaged in dredging San Diego Bay in the summer of 1942 and there-[276] after?

A. Not in 1942. We had completed certain work at that time and were working in other locations at that time.

Mr. Sloane: In order to save the witness from stepping down, may I indicate here a white streak running down the center of the Bay?

Q. Will you indicate what that designates?

A. That is entitled the main channel.

Q. Deep water channel?

A. Yes; deep water channel.

Q. What is the area shown in white?

A. The area which you indicated has marked on it a depth of 30 feet.

Q. Taking the channel opposite what we call the subject land, which is the south end of the white area on the map, what was the depth of the water there in the summer of 1942?

A. 30 feet below mean low low water.

Q. Did your company have any part in dredging that area?

A. Yes; we dredged this area as I indicate, the southern portion of the main channel of the Harbor, under contract with the United States of America.

Q. That would be approximately beginning at the ferry crossing and extending southerly? [277]

A. A little south of the ferry crossing and extending southerly to National City.

(Testimony of Barrett G. Hindes)

Q. To a point opposite the southerly boundary of the subject land? A. Correct.

Q. Will you tell us what was done with the spoil or mud that came out of that area?

A. It was deposited in several locations. There was a portion of it filled in this area here at Coronado. This rectangular area was constructed and this fill in here was constructed, including these two moles. The two moles were constructed under a supplemental agreement from the Army Engineers, as it was not a portion of the regular contract.

Q. Picking up the latter part of your statement, then, do I understand that the San Francisco Bridge Company took soil out of the Bay area and deposited it on the subject land back of the bulkhead line?

A. That is correct.

Q. That was prior to 1942?

A. That is correct. That entire area was mud flats until the time that we constructed these fills both for the United States and for the City of National City.

Q. When you speak of mud flats, will you describe the condition of the subject land before any filling was done, in a general way? [278]

A. It was an area extending from dry land out to deep water, or I should not say deep water but there was a gradual slope from the dry land out to the central portions in the harbor, and a large portion of this area was what is known as above low tide. In other words, as the tide would go up and down, it could cover and uncover as you have frequently seen, and then from that low tide point it sloped gradually. I think that the outer end of

(Testimony of Barrett G. Hindes)

the subject properties was somewhere in the neighborhood of three to four feet of water.

Q. That is, the westerly edge of what is known as Area A? A. Yes.

Q. Now, bringing it down to November, 1942, will you describe the condition particularly of Parcel 7 and the southerly portion of Parcel A? Or let me interrupt. I will withdraw that question. The San Francisco Bridge Company obtained a lease from the City of National City on the 10th day of October, 1940?

A. That is correct.

Mr. Sloane: We offer in evidence a photographic copy, which is kindly accepted by counsel, of a tideland lease, dated October 10, 1940, executed by the City of National City, hereinafter referred to as the City, and San Francisco Bridge Company, hereinafter referred to as the Company. For the sake of brevity, if I may, I will refer to that organization [279] as the Company hereafter.

Mr. Landrum: As I understand it, your Honor, the exhibit has been marked or will be marked Defendant's Exhibit L, and there is no objection to it. It is a photographic copy but we don't raise that question at all.

The Court: It may be received and so marked.

(The document referred to was received in evidence and marked defendant San Francisco Bridge Company's Exhibit L.)

[Defendants' Exhibit L—Lease pertaining to interests of defendants other than appellants. See original.]

(Testimony of Barrett G. Hindes)

Mr. Sloane: We also offer a contemporaneous agreement, dated October 10, 1940, executed by the San Francisco Bridge Company, a corporation, and the City of National City, entitled "Memorandum of Agreement," that being also a photographic copy.

Mr. Landrum: There is no objection to Defendant's Exhibit M, your Honor.

The Court: It will be received and so marked.

(The document referred to was received in evidence and marked defendant San Francisco Bridge Company's Exhibit M.)

[Defendants' Exhibit M—Lease pertaining to interests of defendants other than appellants. See original.]

Q. By Mr. Sloane: Did your company have any interest in the subject area prior to that date in 1940, October, 1940?

A. We had been working with the City of National City, for some time prior to that, in order to prepare this and come to an agreement. [280]

Q. You had been negotiating—

A. We had been negotiating and our interest was merely in that. [281]

Q. Now, will you tell us on October 10, 1940, what was the condition of the lands, taking as a reference point the bulkhead line which, as I understand it, separates parcel A from parcel 7? A. Yes.

Q. What was the depth of water there at the mean low low tide? A. In October, 1941?

Q. 1940, I believe, is the date.

A. In October, 1940, it was along the bulkhead line. Probably the ground was four or five feet above low tide,

(Testimony of Barrett G. Hindes)

but there was no water adjacent to the bulkhead line except on high tides.

Q. Where was the nearest deep water, meaning by that a channel amounting to 10 feet in depth at low low tide?

A. Approximately 1,000 feet out to the west—no, in October the dredging had not been completed to that point yet. It was progressing from north to south, and it was probably 1,500 to 2,000 feet to the northwest of the subject area.

Q. Under whose direction was this progress going forward?

A. The work was being done by the San Francisco Bridge Company.

Q. Was that under contract? [282]

A. That was under contract.

Q. And the contract called for dredging how far south?

A. To a point approximately opposite the lower—the south end of the subject area.

Q. Now, describe to us the condition of the land eastward and southward of the bulkhead line, as shown on Plaintiff's Exhibit No. 1.

A. The land to the eastward was in the process of filling. The land to the south was the original existing mud flats.

Q. Without taking the time to read to the jury this memorandum of agreement, will you tell us what relation that had to dredging in area A and depositing land in parcel 7 and parcel 3?

A. You are referring to the terms of this memorandum agreement with the City of National City?

(Testimony of Barrett G. Hindes)

Q. Yes, in a general way.

A. That agreement recites certain conditions which the San Francisco Bridge Company agreed to as a basis of the granting of the lease, and the prime considerations in that agreement were the filling in of the north mole. I think the other drawing there shows.

Q. The north mole?

A. The filling in of the north mole.

Q. Referring to a project on the land and out into [283] the water—

A. That is correct.

Q. —at the north of the subject area?

A. That is correct. The filling of the south mole on which parcel 7 is partially located, and the dredging of a portion of area A approximately 500 feet by 1,000 to a depth of not less than 9 feet below mean lower water,

Q. Is that approximately the area which I outlined with the pointer now on the chart?

A. That is a portion of it, and then it extends further westward to connect with the deeper water in the channel.

Q. It goes further to the west?

A. Yes.

Q. Now, did you perform the requirements placed on you by this collateral agreement?

A. We did.

Q. Perhaps we can get it by asking you what you did pursuant to that agreement.

A. We made two mole fills, in accordance with the agreement with National City, and as further directed in the permit which was received from the Army Engineers, who have control over such works, and then we dredged the basin, what we call the basin, which is that 10-foot area at the southerly portion of area A.

Q. I will show you an enlarged portion of the chart, [284] which purports to depict parcel A, the southerly

(Testimony of Barrett G. Hindes)

portion of parcel A and all of parcel 7, and ask you if that is a correct reproduction of the land and water area in which our company is interested.

A. Yes. That is a drawing made at my office under my direction.

Mr. Sloane: We will offer that in evidence.

Mr. Landrum: Your Honor please, there are just one or two matters I would like to ask counsel about, as to what they are, and then I think I could—

(Conference between counsel off the record.)

Mr. Landrum: As I understand it, that will be Defendants' Exhibit N, your Honor, and there will be no objection to it.

The Court: So ordered.

The Clerk: Defendants' N.

(The document referred to was marked Defendant San Francisco Bridge Company's Exhibit N, and was received in evidence.)

[Defendants' Exhibit N—Map. See original.]

Q. By Mr. Sloane: Defendants' N now shows in enlargement and in a little more detail what appears on the other charts as the land area of parcel 7 which you had under lease? A. Yes.

Q. And that portion of parcel A which was included in [285] your lease? A. Correct.

Q. It being understood that the rest of parcel A extends to the north and to the west?

A. That is correct.

Q. Does the blue-shaded area and the green-shaded area correctly portray the land and water which the San

(Testimony of Barrett G. Hindes)

Francisco Bridge Company took into possession on the 10th of October, 1940?

A. It includes the areas which were to be land and were to be water.

Q. At that time they were mostly water?

A. At that time they were mostly water and mud.

Q. Now, after your work was completed—by the way, when did you complete the work which was called for under the memorandum agreement, the collateral agreement?

A. It was completed in February, 1941.

Q. So if I move up to that date, I may speak of the green-shaded area as water, and the blue-shaded area as land?

A. That is correct.

Q. And the dividing line is then the bulkhead line, so far as it extends northerly and southerly?

A. Yes, that is the bulkhead line; the bulkhead line as established by the United States Engineers Department.

Q. Actually did the land fill out entirely to the [286] bulkhead line?

A. No.

Q. What was the condition easterly of the bulkhead line?

A. You see, the dredging was done in such a manner as to have approximately the required depth on the bulkhead line, and then there is a slope from that which slopes up to the high ground on what they call,—well, it is steeper than the natural slope, because we filled it in and dredged the toe off to make it as steep as possible, to minimize that slope area.

Q. Did that make a usable water front?

A. Oh, definitely.

(Testimony of Barrett G. Hindes)

Q. And your company actually used it?

A. Yes, sir.

Q. Now, tell us the extent of the dredging which was done in the green-shaded portion of parcel A. What dredging did you do prior to November, 1942?

A. We did all of it there.

Q. We want to know how much was done, to what depth of water.

A. It was dredged to somewhere between, due to the inaccuracies of the dredging processes, between 10 to 12 feet.

Q. Your contract called for a depth of 10 feet?

A. Called for a minimum depth of 9 feet. [287]

Q. Of 9 feet. You actually went beyond that?

A. That is correct.

Q. There was some talk here about depth below mean low low water.

A. That is what I refer to.

Q. That doesn't mean—or, let me put it in terms of a boat. When you had that dredging completed in accordance with your contract, how large a boat could go in, referring to the depth of the water which the boat would draw at ordinary low tide?

A. At ordinary low tide, 10 feet.

Q. It would be safe to navigate that area with a 10-foot draft vessel?

A. That is correct, at ordinary low tide.

Q. At high tide, how much more water would there be?

A. About 5 to 6 feet.

Q. Did you erect a pier of some kind, which is indicated by this brown structure here?

A. Yes. That was a wharf we built on account of servicing our equipment, which was 100 feet long by 30

(Testimony of Barrett G. Hindes)

feet wide, together with an approach over the slope to shore.

Q. Do you have photographs of that structure as it stood on November 16, 1942?

A. Yes, there are some.

Q. I show you a photograph and ask you what view that [288] gives of the pier which is depicted on Exhibit N?

A. That is taken from just about the angle point, right in there. It is looking across the wharf. That should be to the northwest.

Q. Very well. Will you tell us what it shows?

A. It shows the wharf, together with the approach, and I might comment that it shows the semi-permanent construction of the piles, being encased in concrete, in order to assure long life.

Q. Was your company using that here in November of 1942?

A. We were bringing our equipment in there at the time, and it was in use until we were kicked out.

Mr. Sloane: I offer in evidence the photograph just identified.

The Clerk: Defendants' Exhibit O.

Mr. Landrum: There is no objection to Defendants' O, your Honor.

The Court: So marked and received.

(The document referred to was marked Defendant San Francisco Bridge Company's Exhibit O, and was received in evidence.)

[Defendants' Exhibit O—Photograph of shipyard or portion thereof. See original.]

(Testimony of Barrett G. Hindes)

Q. By Mr. Sloane: I show you another photograph, which appears to be another view of the same edifice. Will you describe at what position that photograph was taken, and [289] when it was taken?

A. Yes. That was taken, I think, from about half way from the wharf to the west, and the point in there, looking to the northeast.

The Court: It was taken at the same time?

The Witness: On the same day; on the 16th of November, I believe, 1942.

Q. By Mr. Sloane: That would be looking from one portion of the land, parcel 7, across to the opposite portion? A. Across to the opposite side.

Q. Was there any change in the condition of those premises between the 10th day of November, 1942, and the date the pictures were taken?

A. No, because the work of the construction of the wharf had been completed appreciably prior to that time.

Q. Had the dredging been completed?

A. Oh, yes, the dredging had been completed in February, 1941, which was a year and a half ahead of this.

Q. That carried with it the filling of the dredging material in the areas designated by the City of National City and the Army Engineers?

A. That is correct.

Q. This reference to Army Engineers, is that anything peculiar to this part of the Bay, or does that attend on tidewater operations? [290]

A. The Army Engineers have a certain jurisdiction by law over navigable waters, and particularly in the changing of conditions of navigation, such as the deepening or the preventing of obstructions to navigation, and

(Testimony of Barrett G. Hindes)

they have, I would say, the jurisdiction over harbor areas, particularly from the pierhead lines out, and, also, in connection with any structures which might affect the flow of navigation in those areas.

Mr. Sloane: We offer in evidence the photograph last identified.

Mr. Landrum: There is no objection to Defendants' Exhibit P, your Honor.

The Court: So received and so marked.

(The document referred to was marked Defendant San Francisco Bridge Company's Exhibit P, and was received in evidence.)

[Defendants' Exhibit P—Photograph of shipyard or portion thereof. See original.]

Q. By Mr. Sloane: Mr. Hindes, will you tell us what was the reasonable value of the work which you did in pursuance of your agreements, as a part of the consideration for the lease?

Mr. Landrum: That is objected to, if the court please, as incompetent, irrelevant and immaterial, the reasonable value of the work.

The Court: Overruled.

Q. By Mr. Sloane: Referring to the dredging and [291] filling, primarily.

A. The dredging and filling had a reasonable market value of approximately \$57,000.

Q. With regard to the construction of the pier, will you tell us what was the reasonable value of that construction?

(Testimony of Barrett G. Hindes)

Mr. Landrum: That is objected to, if the court please, upon the ground and for the reason it is incompetent, the reasonable value of the construction of the pier.

The Court: Overruled.

The Witness: It would be \$13,000, including the dolphins, which are shown extending out from it, to which equipment was moored while being serviced at the pier.

Q. By Mr. Sloane: You refer to some brown dots in the water area? A. Yes.

Q. Tell us how a dolphin is made.

A. Well, a dolphin consists of a number of piles driven into the bottom. They are usually spaced a short distance apart, and then pulled together at the top above water, and ordinarily wrapped with wire or bolted, so as to close them together, which forms a kind of tripod-like, to give it lateral stability, and are used for tying up equipment to, or to keep the equipment from drifting. By equipment, I mean the vessels. [292]

Q. There were how many of those piles in place in November, 1942?

A. I believe there were six of those dolphins, and there are four piles in each dolphin.

Q. When did you relinquish that property?

Mr. Landrum: That is objected to, if the court please, as immaterial, when he relinquished it.

The Court: I don't think relinquishment is perhaps the best term.

Mr. Sloane: Very well. I will withdraw the objectionable word, your Honor.

Q. By Mr. Sloane: When did you move off of those premises?

(Testimony of Barrett G. Hindes)

Mr. Landrum: That is objected to, if the court please. I think counsel and I are not in disagreement, but—

The Court: The witness used an expression in his testimony. Perhaps that is more appropriate than the ones either one of you have used.

Mr. Sloane: I think that is an excellent word, but I hardly dared to use it.

The Court: Do you mean the same thing, Mr. Sloane?

Mr. Sloane: I am putting it in the same words, the same action.

The Court: The objection is overruled.

The Witness: We were notified of the taking, I believe [293] it was, the 10th of November, 1942, and arrangements were made so that we moved out as promptly as we could obtain other sites—I mean another place to put our stuff; and with regard to the physical moving of the equipment, from our records it indicates the last straw got out of there in about March of the following year.

Mr. Landrum: Well, as I understood it, your Honor, we were agreed on the date of valuation here.

The Court: I think that is true, but this is a feature which I think the jury should have in mind. It is similar to other lines of inquiry which are not especially pertinent to the ultimate question, ladies and gentlemen, but it may throw some light on it. For that reason you are entitled to hear it.

Q. By Mr. Sloane: On the 10th day of November, 1942, did you make an effort to locate other similar lands and water fronts in the harbor at San Diego?

Mr. Landrum: That is objected to, if the court please, as incompetent, irrelevant and immaterial.

The court: Sustained.

(Testimony of Barrett G. Hindes)

Q. By Mr. Sloane: Do you know whether or not on the 10th day of November, 1942, there were other unoccupied areas of land and an area similar to the subject parcel?

Mr. Landrum: I make the same objection, if your Honor please, with relation to his ability to secure another site. [294]

The Court: Objection sustained.

Q. By Mr. Sloane: Where did you move to?

Mr. Landrum: That is objected to, if the court please, for the same reasons, as incompetent, irrelevant and immaterial.

The Court: The same ruling. Sustained.

Q. By Mr. Sloane: Are you still here, Mr. San Francisco Bridge Company?

Mr. Landrum: That is objected to because it has already been testified to.

The Witness: Well, as I said before, I got kicked out on the street.

The Court: That is another one of the consequences of war, I presume.

Q. By Mr. Sloane: Well, do I understand that the San Francisco Bridge Company is still doing business in the Harbor of San Diego?

Mr. Landrum: That is objected to as incompetent, irrelevant and immaterial, whether they are or not.

The Court: I think they have a right to show the status of the entity. Overruled.

Mr. Sloane: That is the purpose.

The Witness: Yes, we have been doing business continuously in the San Diego area since that time.

(Testimony of Barrett G. Hindes)

Q. By Mr. Sloane: Going back to your duties as [295] superintendent of the San Francisco Bridge Company, will you tell us what experience you have had with tidelands and the occupancy of tidelands as of 1942, November, 1942?

A. Well, in November, 1942, the tidelands I was looking at were out in the middle of the Pacific.

Q. Where were you then?

A. I was in the Navy, sir.

Q. Were you assigned to a particular branch of duty, sir?

A. I was the Harbor Development Officer of the Service Squadron of the Pacific.

Q. When did you last see this particular area?

A. In February, 1941.

Q. Do you know whether any dredging was done on the indicated part of parcel A after the San Francisco Bridge Company got through?

A. Yes. I have examined the records and have determined that dredging was done there in area A after the time I was here and after the Bridge Company did their dredging.

Q. Do you know when it was relative to the date in 1942? Was it before or after November, 1942?

A. It was commenced prior to November 10, 1942; I think in August.

Q. I am speaking now of the southerly portion of parcel A, the water included in your lease. [296]

A. Oh, no, I don't believe that the dredging actually got into our area until after the taking by the government.

(Testimony of Barrett G. Hindes)

Q. Who was doing the dredging in that vicinity? I mean what concern.

A. The dredging was being done by the Case Construction Company. I don't know who was paying for it. I understand the Concrete Ship Constructors.

Q. I just wanted to know who was doing it. The Case Construction Company? A. Yes, sir.

Q. Did they have a dredge in that vicinity prior to November 10, 1942? A. Yes.

Q. You think it was or was not within your water area at any time prior to that date?

A. I don't believe it was.

Q. Where were they working?

A. Just north of this area.

Q. In your duties with the company, have you had occasion to familiarize yourself with tidelands occupied by persons other than the San Francisco Bridge Company? Take the water front of San Diego. Do you know, in a general way, who occupies it, or whether it was occupied as of 1942?

A. Well, the water front of San Diego is, I would say, very populously occupied. The fact is it seems to be pretty [297] continuous from one end to the other, by observation.

Q. In November, 1942, were there any unoccupied tidelands on the easterly shore of San Diego Harbor, fronting on deep water, which was not under occupancy?

A. I can't tell you that. I understand there was very little.

Q. At that particular time you were not here, I believe? A. That is correct.

(Testimony of Barrett G. Hindes)

Q. You say you had some negotiations extending over some period of time prior to signature of this lease with the City of National City?

A. That is correct.

Q. Did you take part in those negotiations?

A. I did personally, yes.

Q. In the course of those negotiations, did you have occasion to investigate rentals and rental values on the harbor front of San Diego?

A. Yes, because we—in the dredging business there is a large amount of equipment and attendant plant, which is, a good deal of it, small craft, and we have to have a base to tie that up when it is not actually dredging, and so I had looked over, you might say, most of the San Diego Bay area to find a suitable place for tying up the equipment and, frankly, I didn't find anything that was very suitable, either as to extent or protection. [298]

Q. What do you mean by "extent"?

A. Well, you have to have a lot of water front and a lot of beach line in order to tie up quantities of equipment that are entailed in a dredging process, such as—you see, there is practically 1,000 feet, 1,000 feet or more, of water frontage in there.

Q. Referring to the line where the green meets the blue?

A. Yes.

Q. What do you refer to by "protection"?

A. Well, it gets pretty rough in San Diego Bay at certain times, particularly when they get wind from the southeast, or any southern flurry, for that matter, so we wanted to get a place where the equipment would be protected from the sea and the chop and the wind at such times, and that was the reason for staying on the inside

(Testimony of Barrett G. Hindes)

of the elbow there rather than going out around the outer end.

Q. In considering and in negotiating this lease, did you have occasion to consider the terms of other leases that were granted to the tenants along the harbor front of San Diego, the rental, what the restrictions were, their activities, and so forth?

A. I inquired in a general way, enough to know that—

Q. Well, don't tell us what you knew. You did inquire? [299]

A. Yes, I did inquire.

Q. Taking into consideration these matters of physical location and the other matters which you have already testified to, and considering the terms of the lease actually entered into, did you have an opinion as to the value of that leasehold right on November 10, 1942?

Mr. Landrum: Could I ask whether or not that includes all structures on it, too, or is it just the leasehold alone?

Mr. Sloane: The leasehold as it stood, with the improvements and structures on November 10, 1942.

Mr. Landrum: All right.

Q. By Mr. Sloane: Will you give us your opinion as to the value on that date?

A. I would value it, taking into consideration the various factors which have been mentioned, plus the terms of the lease and the fact that there was 18 years of the lease to run yet, at about \$120,000.

Q. Do you have a copy of the lease in your hand?

A. Yes.

(Testimony of Barrett G. Hindes)

Q. Will you mention to the jury the features of that lease which gave it added value, in your opinion?

A. Well, as I was one of the main ones in drawing up this lease, why, I think most of these points are good. To start with, in parcel 7 we have a long water frontage without excessive depth. It is about 200 feet of land in [301] depth there, which affords ample space for storage or for warehouse buildings or terminal facilities, such as if you wanted to build docks in there, transit sheds, railroad to serve them, I feel that long water frontage with medium depth is to great advantage.

Then with regard to the water area, the other portion in connection with it, that 500 feet of width is a sheltered basin where equipment or fishing boats, or boats under repair, or dredges, or barges, or other such equipment, can be moored safely throughout the year and can be properly tended, and with access to shore, and all that. Then with that water extending out there, it gives access to the deep water outside.

There is one point in this that has already been mentioned, that the main channel of 30 feet extends down opposite this property, just 1,000 feet away. This lease very carefully stated that the Bridge Company could sub-lease 50 per cent of this area, practically without restriction. That meant that that property was available for development as deep water shipping facilities, as a lumber transfer facility, as oil docks, and any one of the major uses of waterfront property. I believe that clause is something that I haven't seen in any other lease in this area.

(Testimony of Barrett G. Hindes)

Q. What with regard to assignment of the lease?

A. That is what I am referring to, that it may be sub-[301] let or assigned, providing—well, about the only thing that can't be done out there is to commit a nuisance, to have tanneries or the smelting of metals or reduction of garbage or refuse, or any other matter constituting a nuisance, which leaves us pretty broad opportunities for using the land.

Q. Are there any other favorable points that come to your mind?

A. Also, that the lease could not be broken unless there was an actual violation of the terms thereof. In other words, the City did not reserve the right to cancel the lease on any given number of days, either to sell the property, or to give it somebody else, or like that. Another distinct advantage was that the railroad touched the corner of the property; that there were easements; that the City would maintain the street out there, that we had police and fire protection, even though it was somewhat outside of the center of the City. So I considered that the lease was particularly advantageous; in fact, very much more so than the average lease that a person could obtain, say, today or at any time when they have got something to sell or something to lease.

Q. How about the right to remove buildings at the end of the lease?

A. Yes, that right was reserved to the tenant, to move [302] any improvements.

Q. How about taxes?

A. The taxes merely went against the improvements; I mean against physical improvements, and the personal

(Testimony of Barrett G. Hindes)

property taxes, of course, on the equipment which existed there within the city limits.

Q. It provides there shall be no tax except on personal property? A. Yes.

Q. What with regard to exclusive use of the water area?

A. That was granted us by the City through whatever ordinances and rights that they have, in a very similar manner to what, say, the City of San Diego here grants, policing, and individual use of waters in front of certain properties, such as in a boat yard, where it is necessary as a part of the business to tie boats up out near the ways in the water, so that other people can't come and get them all gummed up.

Q. Is it feasible, or was it in 1942 feasible to dredge to a deeper depth than the 10 feet that you left it in?

A. Oh, yes.

Q. Have you an estimate as to the cost, as an expenditure, at that time and since to deepen it, say, to 30 feet within the area? [303]

Mr. Landrum: That is objected to, if the court please, as incompetent, irrelevant and immaterial. We are concerned with the date of taking, and not something they might have conceived to do after that date.

The Court: The objection is sustained.

Mr. Sloane: You may examine.

The Court: I think we will take our recess now, ladies and gentlemen. Remember the admonition and keep its terms inviolate. Occupy the jury room.

(A short recess was taken.) [304]

The Court: All present. Proceed with the cross examination.

(Testimony of Barrett G. Hindes)

Mr. Sloane: I have two more questions, your Honor.

The Court: Very well.

Q. By Mr. Sloane: With regard to the pier which was constructed, can you give us an estimate as to the life of that kind of a structure the way it was made?

A. Yes. The piling as driven in there was actually driven with concrete shells poured around them to keep the marine borers and other deteriorating things away from them. And the piling, of course, was the main basis of the structure. With reasonable maintenance of the stringers and the decking, I would say that pier had a life of 25 or 30 years. In other words, it was well adequate for our lease and that would have an appreciable residual value.

Q. With regard to the rental payments called for in your lease, which I believe was \$10 during the first 10 years and \$50 a month during the second 10 years—

A. Yes, sir.

Q. I will ask you whether or not you have kept the rentals paid called for in the lease.

A. We have.

Mr. Sloane: That is all.

Cross Examination

Q. By Mr. Landrum: Mr. Hindes, will you come with me [305] just a moment down here to the easel here and discuss with me Defendant's Exhibit N? I notice on this Exhibit N certain lines, with a figure on them, for instance, the one to which I am pointing here being a dashed line, with the figure "10" inserted in it. What does that mean?

A. Those lines are what are called contour lines and in a ground surface which is not exactly level this par-

(Testimony of Barrett G. Hindes)

ticular line you referred to indicates that all points exactly on that line are 10 feet.

Q. Now, to develop that for just a moment, what you mean is that that is a line, which we call a contour line, which shows the depth of the water at that place?

A. That is correct.

Q. In other words, that is a contour laid on the bottom?

A. That is correct.

Q. Can you tell me why that particular one is dashed? Is that because they didn't have an accurate sounding and that was projected? I notice some of them are solid.

A. It is for convenience and recognition. You will notice that the "10" and the "5" are both dotted and out in here the "30," "25," "20" and "15" are dotted. In other words, all contours of even 5 feet are dotted in order to make them more easily recognizable.

Q. What I am getting at is this, that that is where the [306] engineers, for example, had taken it at a certain point?

A. Yes, sir.

Q. And that is one where you have definite data?

A. Yes, sir.

Q. But that doesn't mean that they took a shot sufficiently close together that they didn't have to project some of this, does it?

A. Not exactly. In sounding, in the normal procedure of sounding for soundings, they sound at certain intervals all the way along there, dropping a lead line and determining in that way the depth below mean lower low water, and they take a series of those soundings and from those soundings—may I suggest—

The Court: Keep your voice up, please.

(Testimony of Barrett G. Hindes)

The Witness: May I suggest that there was an exhibit presented, I believe, which shows this area, with the actual soundings on it, the individual soundings from which these contours were made.

Q. By Mr. Landrum: In other words, this one we have here, that shows those little figures we were talking about the other day? A. Yes.

Q. If you find "10 feet" here and the figure "10" here and the figure "10" here, the engineer will simply draw a line between those tens as best he can and that makes the continuous [307] contour? A. That is correct.

Q. In this map here which is in evidence as Defendant's Exhibit N, we have the actual condition of this land in so far as its elevation above sea level and in so far as its being covered by water as of the date this was made, don't we? A. That is correct.

Q. I notice that up here to where I am pointing on this side, the figures are "5," "0," "Plus 1," "Plus 2." What does that mean?

A. That indicates that the shore is on a slope running from approximately 10 feet at the bulkhead line on a slope up to plus 10 or 12, shoreward of it, from which point the land easterly is all high dry ground.

Q. For instance, if I am correct and, if I am not, please correct me, this exhibit shows that at the point to which I am now pointing that contour is under 5 feet of water, doesn't it? A. That is correct.

Q. And then at this point to which I am now pointing it shows this is zero and that is just at the water level?

A. That is right.

Q. And that at this point it is one foot?

A. Yes.

(Testimony of Barrett G. Hindes)

Q. Can you give some indication from this map, from [308] your experience as an engineer, as to just what that slope would be? In other words, there is one foot slope between this contour line and that one. How far would that be actually out on the ground, if you can tell?

A. Yes; I can tell. Between what elevations?

Q. Where there is a change of one foot; for instance, between the contour line marked "Plus 1" and the contour line marked "Plus 2." How far would you travel on that land from where it is one foot to where it is two feet?

A. About three to four feet.

Q. Do you mean that within three to four feet on that ground right there there was a rise of a foot?

A. I do.

Q. That is a slope, then, of about 1 to 4?

A. That is correct. This drawing is made to a scale of 1 inch to 40 feet. There is approximately 1 inch or somewhere there. So you get from zero up to say 10 feet, which would give you an average of 1 to 4.

Q. Let's develop that a little distance further. What you are saying is that to get a rise of 10 feet—how far do you travel and how many feet is it where the land rises up 10 feet?

A. Approximately 40 feet.

Q. Then, it is fair to say it is 10 feet higher 40 feet back? [309]

A. That is correct.

Q. That is shown right on your exhibit?

A. That is correct.

Q. Now, tell us again just when that situation existed there.

A. Do you mean when these soundings were made?

(Testimony of Barrett G. Hindes)

Q. Yes. I would like to know.

A. These soundings were taken from a drawing made by the Maritime Commission from their soundings, soundings prepared on January 23, 1942, and I compared this drawing with the Maritime Commission drawing.

Q. So, by taking that exhibit, we can visualize the character of this land in so far as its being level or sloping is concerned, can we not?

A. That particular portion of it, which is the water frontage, which is a normal water frontage.

Q. There is another matter that I wish you to discuss with us, please, Mr. Hindes, and that is this question of bulkhead line. I have heard that discussed. Now, what is a bulkhead line? Who establishes it?

A. A bulkhead line is a line ordinarily established by the Army Engineers, usually as a result of public hearings in the local area, and there are usually two lines established at the same time, the bulkhead line and the pier head line. The bulkhead line is supposed to be the limit, that is, the [310] major shore line, the major dry land line. And in between that major shore line and the pier head line is ordinarily the channel line, under permit from the United States Engineers. You can get permits to build either open type wharves or solid wharves or, in other words, structures to serve navigational interests.

Q. Am I correct—this is a little leading, your Honor—am I correct, then, in saying that the question of where that bulkhead line is to be located is a question for determination by the Army Engineers of the United States? Is that right?

A. Yes.

Q. I understood you to say something just now with relation to the control that the United States Army En-

(Testimony of Barrett G. Hindes)

gineers have over the use which may be made of lands similar to these, did I not? A. No; not use.

Q. I notice in this exhibit here which you have, which is marked Defendant's Exhibit N, there is a clause, "It is further understood and agreed that all of said filling and dredging are subject to the permission and approval of the United States Engineering Department, and all undertakings on the part of the company herein contained shall be subject to such permission and approval, but, if the United States Engineers Department refuses to give its permission and ap-[311] proval of the dredging and filling hereinabove described, this agreement is to be null and void and of no force and effect, as will be the lease which is based upon this agreement."

A. That is correct.

Q. Now, will you discuss with us just what it is that the Army Engineers have control of and which you protected against in that exhibit?

A. They have control of the changing of the navigable water areas by dredging or by projecting piers or moles or breakwaters or other structures out beyond the bulkhead line.

Q. Is this not true, that, in order to put in any structures out beyond the bulkhead line, you have to secure the permission of the Army Engineers of the United States? A. That is correct.

Q. And, if you do not get that permission, you cannot construct whatever it is you want to construct there, can you? A. That is correct.

Q. Now, are those permits perpetual and forever or may they be revoked or changed by the Engineers?

A. My understanding is that they are perpetual.

(Testimony of Barrett G. Hindes)

Q. I take it this permit business is due to the fact that the Army Engineers control this in the interest of navigation? A. That is the basis of it. [312]

Q. That also is true not only here but it is true also in Chula Vista, isn't it?

A. And in San Francisco and New York and everywhere else in this country.

Q. Now, let me ask you this. Are you familiar with the lands on down south of this particular location?

A. I have been down there.

Q. Tell me, then, if you know, whether or not the United States Army Engineers as to this land which lies south of here have as yet established a bulkhead line.

A. I cannot tell you that.

Q. Will you tell me this, whether or not there was, on the 10th day of November, 1942, a parcel of land, of approximately 30 acres, which adjoins this on the south, which was available for rent or lease?

A. Can I tell you if it was available?

Q. Yes.

A. There was an area south but there wasn't much land there.

Q. What was it? A. It was mud flats.

Q. This was mud flats, too, wasn't it?

A. What date are you talking about?

Q. The date before you fixed this up, which were [313] mud flats. A. Yes; that is correct.

Q. What I am trying to get at is there isn't any imaginary chop off here? There is nothing south of this that could be dredged and fixed up like you fixed this line? A. No; I don't believe there is.

(Testimony of Barrett G. Hindes)

Q. As a matter of fact, you are familiar with this channel out here, which I believe you said that you constructed for the government? A. That is correct.

Q. Does that channel extend on down further south or not? What is the situation?

A. At the present time, it stops right at the end of this Area A, I guess you would call it.

Q. Isn't there some channel 20 or 25 feet deep that goes on down?

A. There is some natural, medium depth of water.

Q. Tell us about that. What do you mean? Does it run 20 feet or anything like that?

A. I believe it is indicated on the chart.

Q. Will you be good enough to come down here, please?

A. There is an irregular area in which the depths are natural and irregular. At some points they were 13 feet, some points 15 feet, some points 18 and some points 16, in this area immediate adjacent to the south, that counsel is talking about. [314]

Q. How deep did you dredge this parcel which you say you dredged? How deep did you dredge it to?

A. We dredged it to a minimum of 10 feet.

Q. And then down here in the water, to which you just pointed? A. The water is deeper there.

Q. Without dredging, is that right?

A. Irregularly deeper.

Q. I believe you pointed out to us some of the advantages of your particular lease. You said something with relation to your right to sublease?

A. Correct.

(Testimony of Barrett G. Hindes)

Q. You had that clause in your lease?

A. Yes, sir.

Q. Why do you say that the right to sublease makes that lease more valuable?

A. Because the land has potentialities and the area has potentialities of development for certain deep water interests, which give it a higher value.

Q. In arriving at your conclusion with relation to the fair market value of this leasehold interest, did you take into consideration the fact that the lease contained a provision that you might sublease 50 per cent of it?

A. I took into consideration the lease as a whole and that might have a minor effect, among other things. [315]

Q. When you use the word "minor" do you mean it would have a minor effect or a major effect?

A. In this lease there are many advantageous points. I would not say that you could just pick one clause out and say that is the secret of the lease because they all have a bearing.

Q. By your answer with relation to the fair market value of that land, did you mean what your lease could have been sold for on the open market, for cash?

A. I was referring to what it was worth to us and I conceive that it would be worth at least that much, if not more, in the open market, as to its market value or as a sublease.

Q. If it didn't have a sublease clause permitting you to sublease it, it wouldn't be worth anything in the open market, would it?

A. That would restrict it to the value which I would put on it for my own uses.

(Testimony of Barrett G. Hindes)

Q. So, if the clause to which we are referring were not within that lease, you couldn't get anything for it on the open market, is that right?

A. Oh, naturally, if you can't sublease it; if it says you can't sublease it.

Q. And then the value for that purpose goes out the window, is that correct? [316]

A. It would.

Q. Will you just give me another one of your factors there that you said you took into consideration in arriving at your conclusion with relation to the market value in addition to your right to sublease? What were the other peculiar features of this lease?

A. It was non-cancellable except on violation of the terms of it.

Q. When you say that it was non-cancellable, do you mean that the City of National City could not, for any reason of its own, say, "Mr. San Francisco Bridge Company, we desire to terminate your lease"; that they couldn't do that?

A. I don't think they could. I think they could say it but it takes a better lawyer than I am, shall I say, to know whether it would do them any good to talk.

Q. What I am getting at, Mr. Hindes, is this. If that lease contained a clause which provided—if the City of National City wished to cancel that lease because it proposed to use the land for its own purposes, would you think it would have any value then to you or anyone else?

A. Do you mean would the lease have any value to me?

Q. Yes; if it had that clause in it.

A. It would have appreciably less value.

(Testimony of Barrett G. Hindes)

Q. As a matter of fact, you would never have signed any [317] such lease as that, Mr. Hindes, would you?

A. I don't believe I would.

Q. Do you have any records or are you able to tell us how long it took you to do this dredging to which you have referred?

A. Do you mean in that particular basin there?

Q. Yes, sir. I understood you to say that the dredging cost you or that you invested in the dredging a certain amount of money. Now, I want you to tell us how long it took you to do it.

A. I said the dredging in that area had a fair market value of that amount.

Q. How long did it take you to dredge it for what you set at a fair market value of that amount of money?

A. It was dredged in the month of February, 1941.

Q. How many days?

A. I don't recollect. I have computed the quantities.

Q. Tell us the number of cubic yards of dirt that you moved in doing that dredging.

A. Approximately one hundred sixty-three thousand odd.

Q. One hundred sixty-three thousand odd?

A. Yes, sir.

Q. You were engaged in the dredging business at that time, weren't you? A. That is right. [318]

Q. As a matter of fact, you were doing dredging for the government of the United States at about that time?

A. That is correct.

(Testimony of Barrett G. Hindes)

Q. What was the going price per cubic yard for dredging such as you did there, as of that time?

A. 32 to 39 cents per cubic yard.

Q. Take 40 cents and move the number of cubic yards that you say you moved and then what would have been the cost of that dredging?

A. Well, that would be 40 times 163. To be perfectly frank, I multiplied it by 35 cents.

Q. All right. Take that figure. What does it come to? A. \$57,315.

Q. Now, I am going to ask you if it is not a fact that you had a contract about that time, to do a job for the government, at a figure of 10.3 per cubic yard.

A. That is correct.

Q. Why do you say that 35 cents, then, would be proper on this one?

A. Because one job was a 6,000,000-yard job. And due to mobilization of plant and various other factors entering into it, one price is applicable to one type of work and another to another. And I make the statement that 35 cents is a fair figure due to the fact that there were two jobs in [319] identically the same area, one job of, I believe, 158,000 yards, which went for 32 cents, which was dredged in the same area right there, and another one, a little bit smaller, adjacent to that, in between the two moles, for 39 cents.

(Testimony of Barrett G. Hindes)

Q. Did you do those other jobs?

A. No, sir; we did not.

Q. When a man has got a job to do and particularly in this dredging business, and gets his dredge down there set in that locality, he can do it a lot cheaper than if he had to move it in, can't he? A. That is correct.

Q. You have discussed with us this business of mean low tide, have you not?

A. I mentioned it. I merely mentioned it.

Q. Tell us what that means. What do they mean when they talk about mean low tide?

A. The expression, if I may correct you, is mean lower low water. Each day there are four tides. There are two low tides and two high tides. Of the two low tides there is a high low tide and a low low tide. By taking the average of the low low tides throughout a great many years, the United States Engineers have determined a figure, or I mean a point. It is the base from which most or all dredging that I know of is done from and the base from which most wharf elevations are set from. It is a mechanical computation of [320] these actual tidal readings.

Q. It is what they say is the average? For instance, they take the low low tide and the high low tide and they add the two of them together?

A. No. They just average the low low tides. It is just what the word says, meaning lower low water.

(Testimony of Barrett G. Hindes)

Q. I think you said there were four.

A. That is right.

Q. They only take the high low and the low low?

A. No; they only take the low low.

Q. Now, that has nothing whatsoever to do, though with the average high, does it?

A. No. It is the point from which you measure the average high.

Q. But that doesn't mean that that is the average or the way the tide comes inland, does it? A. No.

Q. In other words, they took an average of the lows, the middle of the lows? A. Yes, sir.

Q. They didn't take the high tide into consideration at all? A. That is right.

Q. In other words, when we talk about mean low tide, that doesn't mean that the water doesn't sometimes get many [321] feet above that?

A. And goes somewhat below it.

Mr. Landrum: I think that is all.

Mr. Sloane: You may be excused.

Mr. John M. Martin: If the court please, may I ask the witness one question at this time?

The Court: No; I think not. The record may show that John M. Martin, representing the Tavares Construction Company, asked that question.

Mr. Sloane: We will call Mr. Joseph Brennan.

JOSEPH W. BRENNAN

called as a witness by and on behalf of the defendant San Francisco Bridge Company, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Joseph W. Brennan.

Direct Examination

By Mr. Sloane:

Q. State your full name. A. Joe Brennan.

Q. Do you live in San Diego? A. Yes, sir.

Q. For how long? A. 55 years.

Q. Do you have an official position here? [322]

A. Yes, sir.

Q. What is it?

A. Port Director of the City of San Diego.

Q. For how long have you been such Port Director?

A. 29 years.

Q. Will you tell us in a general way what the scope of your duties is and has been during those years?

A. Yes, sir. It is the control and operation of the Harbor Department of the City of San Diego, entering into tideland leases for buildings, piers, docks, drainage, sewers and whatnot.

Q. Prior to that, did you have some navigation experience?

A. Yes, sir. I was with the Spreckels Towboat Company for about 10 or 15 years.

Q. What were your activities as of November 10, 1942? A. Down to the Harbor; Port Director.

Q. Did your duties on that date cause you to be acquainted with the water front of the Harbor of San Diego, with particular reference to the easterly shoreline? A. Yes, sir.

(Testimony of Joseph W. Brennan)

Q. What dealings did you have with leaseholds and tenants on or before that period?

A. Well, our office handles all tideland leases. We have some 75 or a hundred leases and we have to negotiate [323] the terms and conditions of the leases.

Q. When you say "we have to," who do you mean?

A. Our office.

Q. Do you take any part in that yourself?

A. Yes, sir; I am it. In other words, I am the goat.

Q. You are familiar, then, with the leases that are now outstanding and were outstanding in November, 1942?

A. Yes, sir.

Q. Can you indicate on this chart Exhibit K about the range of territory that is covered by the city tideland leases?

A. Yes, sir; from here down to about here. In other words, we go from the government reservation clear on around down to the government reservation line at 28th Street.

Q. Does the City of San Diego have any control south of 28th Street?

A. No, sir.

Q. Under what is that adjacent control?

A. Some of it is the Destroyer Base and then National City and Chula Vista.

Q. With reference to the National City and Chula Vista areas, can you tell us what was the condition of the deep water channel in 1942, in November?

A. Well, it shows on that chart a 30-foot depth down [324] to just below the area that is called the Destroyer Base.

(Testimony of Joseph W. Brennan)

Q. Going a little further south on the channel, is there any useable land, to your knowledge, south of the point of the subject land we are talking about here?

A. There wasn't at that time; no, sir.

Q. In other words, the tidelands have to be filled in to be useable?

A. The only area that was filled in was the little piece of project in about the "Y" at National City, outside of government-owned property.

Q. What land did the City of San Diego have available for use at that time, in November, 1942?

A. We had about 50 acres, I think, all told, out of our area, which wasn't under lease.

Q. What portion of the San Diego City tidelands are devoted to commercial-industrial uses?

A. Well, generally, it is considered from about Fifth Street on down to the government line.

Q. To what extent was that occupied in 1942?

A. We had about, I guess, possibly 40 or 50 acres that wasn't under lease at that time.

Q. Was that devoted to any purpose and dedicated to any purpose particularly?

A. Chiefly, cannery and boat works and allied industries that have to do with the fishing industry, like oil [325] docks.

Q. Do I understand that that is the use to which those lands were being put in 1942?

A. Yes, sir; those that were occupied.

Q. What portion was not occupied?

A. Here is the foot of 28th Street. There was a little area in here, about 16 acres on that side and about 20 acres in here, that wasn't leased yet. This area is

(Testimony of Joseph W. Brennan)

what is called the fish cannery area, and this area was to be a boat basin or whatnot, and the canners were to go into this area, and then the Federal Housing came along and took all of this land in about 1942, I think, or 1941, and made a housing project out of it. And then, when they got off, the canneries and the National Iron and Shipyards and one thing and another took it up and built on it.

Q. When did the government get off?

A. I think around 1945, or I think the Navy held onto its piece until 1946.

Q. In your opinion, is there any distinction to be drawn between the value of use of the tidelands in the subject area and the value of the use of tidelands say at the foot of 28th Street and that vicinity, assuming that the development is of the same degree on the parcels in both locations?

A. I think not. I don't see why it should if it is all tideland. They don't go on the tidelands unless they want [326] the water frontage as a rule. And it would seem in this area anywhere they should have the same value. That is the way I tried to look at it.

Q. In your opinion, what was the value, the rental value, of tidelands in the southerly portion of the San Diego limits and the tideland opposite the City of National City in November, 1942?

A. I wouldn't be qualified on this one down here but I know what ours is. We get—

Mr. Landrum: Just a moment, if the court please. That is objected to upon the ground and for the reason that the witness has admitted that he is not qualified down in the City of National City.

(Testimony of Joseph W. Brennan)

The Court: He stated previously that he couldn't see any differentiation between them, assuming that the conditions were similar. I think it is a question as to the weight of his evidence, not as to its admissibility. He may answer.

Mr. Landrum: All right.

The Court: The objection is overruled. If you have finished with the map, you might resume your seat. Do you want to use the map any more with the witness?

Q. By Mr. Sloane: You might indicate where the city boundary lines are.

A. That is our limit right there when you cross over this dry creek here. You then get into the government prop-[327] erty and our property goes from here on around to the government line over here. And along in this property in here we get so much per year per square foot. That is the value we put on our leases and it is more or less reflected—

Q. Will you take your seat?

The Court: Now we will have that question read to which the objection was overruled.

(Question read by reporter.) [328]

The Witness: Shall I answer that?

The Court: Yes.

The Witness: Well, as I said before, my interests are in San Diego and I know definitely what they were, because I know what we got for them, see, but when it comes to National City, if I were running the show for National City, I know I would get as much as we got or more than we got in San Diego, because in San Diego we have no more room. But I don't know what they did down there. I don't know how they run it. I know we

(Testimony of Joseph W. Brennan)

get all we can, but we do have a standard to which we do not go below.

The Court: What was that? That was the question you were asked.

The Witness: That starts in at three cents a square foot and is progressive.

Mr. Landrum: Just a moment. If the court please, I am going to object on the ground and for the reason that he is stating present-day values, present-day rentals. We are concerned here with a date in 1942.

The Witness: I didn't exactly say that, Mister, because our records show—

The Court: Just a moment. We are trying to get a record here, and I am responsible for it. I think you ought to give it as to the date of the taking. That is the pertinent question here, not at some other period. [329]

Q. By Mr. Sloane: Referring to November 10, 1942, Mr. Brennan, can you give it to us back that far?

A. Yes, sir. We have many leases on that date, at three, four, five, six and seven cents.

Q. Now, when you spoke of a progressive rate, how is that calculated?

A. Every five years there is an increase of one cent.

Q. That is, taking the first five years, it will run the first five years at three cents, then five years at four cents, and so on?

A. Yes, sir.

Q. I will ask you to examine the tideland lease which is in evidence here, marked Exhibit L. I believe you have seen that before, have you not?

A. Yes, sir.

Q. Will you state how that compares, how the rights granted under that lease to the occupant compare with rights granted to occupants under your leases with refer-

(Testimony of Joseph W. Brennan)

ence, first, to assignability? What does your standard lease provide as to assignability or subletting?

A. Our tideland leases provide in San Diego they cannot be assigned or transferred without the permission of the Harbor Commission.

Q. With regard to cancellation, what provision do you have in your leases? [330]

A. Well, cancellation for not complying with the terms and conditions of the lease, and then they also reserve the right to change, annul or modify leases.

Q. Without any restriction as to why you do it?

A. Yes.

Q. Do you make any differentiation in the rate of the rental on account of the use to which the property is to be placed by the lessee?

A. Well, yes. For instance, an oil station like on Pacific Avenue that employs two or three people, they generally start out at seven or eight or ten cents, on us. They run a little higher on that type of lease. If you have a large industry like, well, say, the Consolidated, for example, who during the period of the war paid six or seven hundred thousand dollars in taxes, we take that into consideration in setting our rental, considering that the taxes go into the City coffers, and it is equivalent to a rental. Then another industry like a cannery, which is one of the few industries that can operate successfully in San Diego, we give them consideration. They also have a large pay roll and pay considerable taxes. They take a larger—I mean, they run a lighter rate than like a restaurant or a filling station, or some little thing like that.

(Testimony of Joseph W. Brennan)

Q. The rate that you spoke of, is that what you classify as a smaller rate or larger rate, or what? [331]

A. Which rate?

Q. The three, four or five cents.

A. That is our average for industries now, yes, sir.

Q. As of 1942? A. Oh, this in 1942?

Q. Yes.

A. We had some of them then, yes. Twenty-five years ago we had to go out and look for tenants. Today we can't find a place to put them.

Q. What is the customary period of leasing by the City?

A. We can lease up to 50 years. Ordinarily they try to get by, if it is a pretty good investment, on 25-year periods, and small investments on—do you want to save that thing there?

Q. Yes, we may want to use it later.

A. —the smaller leases, with smaller investments, we try to get by with 5 or 10 years.

Q. What I am trying to get at is as to the progressive rate of three, four and five cents? Did it go on indefinitely?

A. No, to 25 years. Then at the end of the 25 years, they have an adjustment, setting a rate for a further 25 years if the lessee takes up the option.

Mr. Sloane: You may examine. [332]

By Mr. Landrum:

Q. What did you mean when you said they try to get by on a 25-year lease?

A. Well, we feel unless you have a big investment that 25 years is a long period, and we don't like to tie the lands up for longer periods than that, if we can help

(Testimony of Joseph W. Brennan)

it. Naturally, a lessee wants to get 100 years, if he can, but these are public lands and we are answerable to the taxpayers, and what not, and we try to keep the City's interests in mind as best we can. If we have a good tenant and the lease goes 25 years, at the end of the 25 years he has no trouble getting an additional 25 years.

Q. I thought what you meant was to say some didn't want to go as long as 25 years. A. Oh, no.

Q. They want more? A. Yes, sir.

Q. Of course, the longer period they can get, if they are substantial people, the better it is for them; that is right, isn't it? A. Yes, sir.

Q. And that is also better for the City of San Diego, I take it? A. Yes, sir. [333]

Q. Now, do you know, Mr. Brennan, what was the going price or what were they actually getting for these leases on November, 1942, down in the City of National City for this land with which we are here concerned?

A. What National City was getting?

Q. Yes. A. No, sir.

Q. Do you feel that the rate of rental which was being received in the City of San Diego would be a proper measure to determine the income which was being received by the City of National City for these lands?

A. Do I understand you to mean, do I think that National City should get the same rate we got?

Q. Yes.

A. Why, I wouldn't see any reason why they shouldn't.

Q. Well, do you know what they were getting?

A. I do not.

(Testimony of Joseph W. Brennan)

Q. All right. Now, I believe you said that in arriving at your figure upon which you would enter into a lease with a private individual or corporation, you took into consideration what benefit that corporation or individual might actually give to the City of San Diego, in addition to the rental, didn't you?

A. That is one of the determining factors, yes, sir.

Q. That is right. You, as a representative of the [334] City of San Diego, have gotten the best price you could get?

A. That is right.

Q. By taking into consideration the advantages which this particular corporation would bring, on account of its pay roll, and things of that kind?

A. That is correct.

Q. In other words, you have taken an overall picture?

A. Yes, sir.

Q. Did you have any leases here which extended back with the back land as far as 1,000 or 1,500 feet away from the bulkhead line, for which you received the rental that you have given us?

Mr. Sloane: Your Honor, may I interpose an objection on the ground that is not proper cross examination? This witness has confined his testimony to parcel 7, which goes back 200 feet or so.

Mr. Landrum: That is correct, your Honor. I withdraw the question.

Q. By Mr. Landrum: I will ask you, did you, in arriving at your figures there with relation to the rental, take into consideration, or did it make any difference

(Testimony of Joseph W. Brennan)

about how far back from the bulkhead line the property was in what you would get for it?

A. Well, I would say it didn't make a heck of a lot difference because, as I said before, if a fellow goes down [335] to the water front, he goes down to the water front because he wants water frontage, and so forth. Take the National Iron. They extend back a considerable distance because they require it in their activity. But taking the Marine ways, they only have to go back, say, 200 feet. In our case we haven't any land, or I should say only a small acreage that runs back beyond a short distance, and mostly that is down on Lindbergh Field, but all property there is water-front property and carries practically the same value, as we see it.

Q. What I am trying to get at is this: just tell us how far back does your property run? How far back is the back land in San Diego that you are talking about?

A. Well, starting in at the foot of Eighth Street, it is about four or five hundred feet. Then it goes down to about Benson, where it is 200 feet. At National Iron it is 1500. It zig-zags in and out according to the mean high tide line, but that is available for that purpose, and practically all of our people, as I said, are on the water frontage.

Q. Now, Mr. Brennan, what makes this land, this tideland that we are discussing? You can make it out of any land that is on the water, if you fill it in or dredge it out, can't you?

A. Well, getting back to Barrett Hinds' testimony about your pier and bulkhead, the United States Engineers [336] take the tidal prism of the water, and they specify a bulkhead line and pierhead line, and if you go

(Testimony of Joseph W. Brennan)

beyond the bulkhead line, you must get a War Department permission, which grants you that permission, and which the City got when they built the B Street pier. When you get to dredging, that makes your valuable land. It is the same as down there, and if you don't dredge, you don't get the deep water.

Q. But the difference is as to how much money you are going to put in in making that dredging?

A. How much money?

Q. How much money are you going to put in in reclaiming those lands.

A. Yes. Some parts dredge easier than others and some are tougher.

Q. And that situation is also true down south of National City, if they went in there and spent enough money?

A. Oh, yes. Yes, sir, you can make land if you have got money enough to make it.

Q. And when you make it, you get water next to it, then, don't you? A. If you use your head, yes.

Q. And if you don't use your head, you lose your money? A. Yes, sir.

Q. Now, there is just one further question I want to clear up, please, Mr. Brennan, and that is, I want you to [337] tell us definitely if you know how many acres, or what area here in San Diego was available for lease, and available on the 10th day of November, 1942? I believe you gave us that figure, but I want to get it as definite as I can.

A. Well, I wouldn't attempt to give you within a few pieces, as to what we had. I did check it over because this was one of the questions they said they might ask,

(Testimony of Joseph W. Brennan)

and I did go through the records, and I found we had around 50 acres around that time. That included practically every little piece. We had stretches here, there and yonder, but the only amount of any acreage in any one piece was, as I said before, the piece the Federal Housing took near the foot of 28th Street. The rest were in small acreages. Some were held up for cannery purposes, and what not, but we had at that time about that many acres.

Q. So, as I understand you, you made a particular study to come in and give us that figure in this case?

A. I didn't. I told you I wasn't going to come in here and get caught, and not know what I was doing. I do not carry all those figures in my head.

Q. All I asked you was this, Mr. Brennan: You really did go and make a particular investigation to get it right and to come in and tell us?

A. I said approximate. I am saying that if you want the records, I can get them. But I am not going out and [338] tell you exactly, or these people, that I had exactly this much or that much, but I do know we had a limited amount, and I do know that more or less a lot of it was taken up, and in 1942 we practically got rid of everything we had. We had nothing from then on until they released something in 1946.

Q. Can you help me a little bit more? About when was it in 1942 you got rid of practically everything you had?

A. Early in 1946—

Q. In 1942?

A. Early in 1942, right after Pearl Harbor the Navy took over the big areas we had down there and left us nothing to lease.

(Testimony of Joseph W. Brennan)

Q. But before Pearl Harbor you had lots more?

A. I didn't say lots more.

Q. Well, you had some more?

A. Yes, I had some more.

Mr. Landrum: All right. That is all.

Mr. Sloane: Unless other counsel want to question Mr. Brennan, or the court, that is all.

The Court: I guess that is all.

(Witness excused.)

The Court: Ladies and gentlemen, we will take a recess until 2:00 o'clock this afternoon. Remember the admonition and keep its terms inviolate. [339]

(Thereupon the jury was excused, and the following proceedings were had outside the presence and hearing of the jury:)

The Court: The record will show that these proceedings are at the bench, in the absence of the jury, government counsel being present and counsel for the Tavares interests being present.

Now, Mr. Martin, will you state again what you did before when the reporter was not here?

Mr. John M. Martin: I desired, your Honor please, to bring into the court room immediately preceding the commencement of my clients' testimony certain models and maps that I have had prepared, for the purpose of showing the claim of my client. I have specifically requested permission so to do because there has heretofore been presented to the same witness certain questions with which I am not concerned.

The Court: What is the attitude of government counsel?

Mr. Landrum: There is no objection whatsoever to just bringing them into the court room. I do not think they should be displayed to the jury, however, until they are received in evidence.

The Court: That is right. They will not be so displayed. There is one further matter I would suggest to both of you. I think in the opening statements, particularly on behalf of the Tavares interests that there should be some [340] clarification of that because the pleadings and the proceedings thus far haven't given to the jury, and I am afraid the jury will not be able to sense or appreciate just what the Tavares interests' claims are and what the government contends with respect to them.

Mr. John M. Martin: Do you want to make an opening statement on that?

Mr. Landrum: Now, if your Honor please, in that connection, in view of the situation which has gone forward with relation to the landowners' claims, the government feels that it should, with the court's permission, defer its opening until the government starts with its case. If, however, your Honor feels it might clarify the situation, I would have to make an opening as to all our case, both the landowners and as to Tavares. If I make any, I feel I should, but I would like to defer the government's opening. I would have to make it as to all of them, I suppose, if I am going to make it before the Tavares case.

The Court: There is a vast difference between the issues that are created under the pleadings and under Judge Yankwich's ruling as to the Tavares interests and as to the others.

Mr. Landrum: That is right.

The Court: The latter are simplified as compared with the issue that is presented under the record as to Tavares [341] and its auxiliary and companionate activities.

It was the court's intention at the outset, and I think it is still the proper method, providing the opening statement as far as Tavares is concerned is confined to evidential, probative matters,—

Mr. John M. Martin: It certainly would be.

The Court:—and does not merge into any argument on deductive matters—

Mr. John M. Martin: Oh, no.

The Court: —I think that if that is the case, the government at the commencement of its case, its responsive case, should cover the entire field—

Mr. Landrum: Yes, sir.

The Court: —with specification, however, as to the intricacies, because there are some in the Tavares issue that do not exist, in my judgment, at all in the other issues.

Mr. Landrum: That is right.

The Court: The other issues are simplified issues and there is plenty of authority in the books pertaining to them, but on this Tavares matter I am frank to say on independent research, and such as we have had from the files, it does not give us much light, and we are pioneering a new field, more or less.

Mr. John M. Martin: That is right.

Mr. Landrum: That is right. [342]

Mr. John M. Martin: The only thing I could suggest would be if I could make, or my brother make the opening statement, say, for 15 minutes and then the government would follow, because there are going to be a lot of things, I might state, that he is going to dispute.

The Court: I can see that as to the Tavares matter there should be before the jury interests of both the Tavares interests and the government's interests, because otherwise there may be some confusion. I am not going to determine, and will say that if the government feels it would be better to present its case when it opens its evidence, that is the proper and the normal and usual method, but I do feel there is something in what you say.

Mr. John M. Martin: For instance, in an effort to expedite this case,—

The Court: I am not so interested in expediting it as I am in clarifying it so that the jury will know what to do. [343]

Mr. John M. Martin: There is one exhibit, your Honor, which is a calculation of our option price as calculated by our accountant from an audit which he has made, which I have shown counsel, and I don't think he will take much time in questioning it. I will produce the man who prepared it.

Mr. Landrum: You won't have to put him on. I have examined it, and I will stipulate to their figures. Why bring in the records? I will stipulate that his figures are correct.

Mr. John M. Martin: We will save a week's time, if you will.

The Court: Fine. It looks like we are having a little pre-trial here.

Mr. Landrum: We have been having a pre-trial right along, your Honor.

Mr. John M. Martin: I have had our general accountant and administrative officer take from the government Defense Plant Corporation's records the original cost which the government incurred in the construction of the facilities, dredging and machinery, and I have had

him take our lease which provides an option price and the basis of depreciation, and I have had him calculate the depreciation and prepare an exhibit which shows the same numbers. For instance, take No. 2101,—have you a copy of it?

The Court: Have you seen that? [344]

Mr. Landrum: Yes, sir, I have seen it, and I agree to his figures.

The Court: You both agree to that?

Mr. Landrum: And it isn't necessary to put in any evidence. The whole question is what the Tavares had, and we agree to that figure of \$2,141,000.

Mr. John M. Martin: The only reason I put it in, if I may show the court the exhibit, it shows, as I say, No. 2101, and that is the original government record number. Counsel has all of those original records and his people have checked them. For instance, that is the administration building. My exhibit will show 2101, it will show the date when the building was constructed, it will show the general type of construction, it will show the actual cost and will carry forward the depreciation on the option price, and is identified by the number 2101, and that same number has been carried forward onto my model and map, so if I could give a copy of that exhibit to each of the jurors, so that they could follow it in sequence. Otherwise they will have to make notes and practically have to be shorthand reporters.

Mr. Landrum: They don't have to have any figures. We will agree on them.

The Court: Are you going to dispute the authenticity or the verity of the instrument we are talking about?

Mr. Landrum: No, sir. [345]

The Court: Why can't you both stipulate to its being received without calling witnesses in extenso on it?

Mr. Landrum: If that is all it is, but, your Honor please, I think he is going further with it.

Mr. John M. Martin: Another thing is to have the jury know the type of construction and that it was built.

The Court: Is this the instrument (indicating)?

Mr. Landrum: Yes.

The Court: You have seen it?

Mr. Landrum: Many times.

The Court: Now, is there anything about it, either arithmetically or otherwise, that you think is objectionable?

Mr. Landrum: Nothing except the statement that they have taken it from records of the government of the United States.

Here is the thing I objected to: "Option price as of December 23, 1944, of the Facilities and Machinery as Calculated by Gregory D. Smith"—

Mr. John M. Martin: That is our witness.

Mr. Landrum: "—from Assets-Property Record of Defense Plant Corporation."

Now, if there is an inference that they have by some method or means gone and gotten this information from us without our consent, or something from us, that is the thing [346] I feel is uncertain.

Mr. John M. Martin: We were furnished by the Defense Plant Corporation with a complete record of the government cost that was brought currently down to date from the inception of the work down to completion. It is a complete volume of this size (indicating) and every item on here we have taken from that, the actual figure that is set forth on the government record. Counsel has a copy of it, and we were in the hope that would all be clarified in advance of the trial.

Mr. Landrum: It is clarified. That is made from invoices of the Tavares Construction Company.

Mr. John M. Martin: And I will produce them.

Mr. Landrum: I don't want them. I don't see any necessity for going into all that. I will agree what your figure says at the end here, and I will so stipulate to it, that it is correct. What does it say? \$2,141,000?

The Court: That is right.

Mr. Landrum: I will stipulate to it. Why bring in the records?

The Court: Do you mean that you were going to object to the consideration of the component parts that make up that figure?

Mr. Landrum: I see no necessity for it, your Honor.

Mr. John M. Martin: Well, I want to prove the fair mar-[347] ket value of these facilities and machinery. For instance, in addition to the option to purchase the site and machinery, we were also given an additional option to purchase or negotiate for the lease or purchase of the facilities and machinery alone, as segregated from the site. Also, our original basic contract says that notwithstanding the affixing of the facilities and improvements to the realty, it shall be and remain personal property. Some place along the line some government attorney, not Mr. Landrum, may contend this action was for the condemnation of personal property, in part, and that I have failed to make a segregated proof by putting on a witness to prove the fair market value of the facilities and machinery. I want him to have the list and say that the fair market value of the facilities and machinery is so much.

Mr. Landrum: I contend it will be all right if he will say this: Counsel for the government and I have stipulated and agreed that the depreciated price, in accordance

with our contract, is \$2,141,000. We have prepared this list.

Mr. John M. Martin: Well, I will call our accountant and in three questions or in three minutes get all of it.

The Court: Why don't you accept his stipulation?

Mr. John M. Martin: Well, when we get through with this we will want you to know that is the option price as of the specific date. Now, we had a declaration of taking on De-[348] cember 23, 1944, and having to take some date for the option price of a lease that expires on December 31, 1949, if I thought he would take the theory that would run the maximum length of the lease, in which event the minimum shall be 15 per cent—well, I feel we have to start with the earliest date we could start with on the option, so I have had our accountant select the date of December 23, 1944, and I have had him calculate the option price as of that specific date.

Now, it is quite a task to make that calculation, and if there are other dates, it seems to me we have picked out at least one date the government witness would calculate from.

Mr. Landrum: That is the date of the taking, yes, sir, and we have agreed on the date of taking. I don't know what we are quarreling about. I can't see the reason why Mr. Martin isn't willing to say: We have prepared this thing, and we agree upon it. The thing I feel he should do is go ahead and say, "We prepared it, the Tavares Construction Company, and this is our exhibit. We did it."

Mr. John M. Martin: I will put the witness on and have our employee say he prepared it.

The Court: Let me make this suggestion, in the interests of clarity and proper expedition. Expedition is only secondary but it is important, of course. Why can't you both agree that the government, whatever that may mean, and all of the entities it may include, and the Tavares interests, [349] whatever they may include, have agreed that this exhibit correctly states the facts that are depicted upon it?

Mr. Landrum: That is right with me.

Mr. John M. Martin: That is perfectly agreeable with me.

The Court: All right. We will identify this now in the record as Tavares' Exhibit—where is our clerk? Oh, he is here.

What would the next Tavares exhibit number be? I am not talking about the interests of the City of National City, but of the Tavares Construction Company.

The Clerk: We have been going right straight through with the numbers, your Honor.

The Court: Yes. What will it be?

The Clerk: The next one is Q.

The Court: Then we will call it Defendant Tavares Construction Company's Exhibit Q, and that is agreed to as stated.

Mr. John M. Martin: Yes, your Honor.

Mr. Landrum: Yes, your Honor.

The Court: Then we will have that marked now so there will be no question about it.

Mr. Landrum: All right.

Mr. John M. Martin: It will be received in evidence as Exhibit Q?

The Court: Yes. [350]

(The document referred to was received in evidence and marked Defendant Tavares Construction Company's Exhibit Q.)

[Defendants' Exhibit Q will be found at page 1305 of this record.]

The Court: Two o'clock, gentlemen.

Mr. John M. Martin: I want to be sure, your Honor,—

The Court: One moment, Mr. Landrum.

Mr. John M. Martin: —when you said a moment ago that you did not want those exhibited to the jury, did you mean you did not want them brought into the court room at all until I have put a witness on the stand?

The Court: I think they ought to be left out. While I do not think the jury would receive any impressions from them they might be curious about them and might be looking at them, so let's not bring them out until the proper time.

Mr. John M. Martin: Yes. I just did not want to transgress your Honor's wishes.

The Court: Yes.

(Thereupon, at 12:15 o'clock p. m., a recess was taken until 2:00 o'clock p. m.) [351]

San Diego, California, Wednesday, February 19, 1947,
2:00 P. M.

(Thereupon the proceedings were resumed in the hearing and presence of the jury:)

The Court: All present. Proceed.

Mr. Sloane: If your Honor please, the witness Brennan wishes to make a correction. May I recall him?

The Court: Very well.

Mr. Sloane: Mr. Brennan.

JOSEPH W. BRENNAN

having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination

By Mr. Sloane:

Q. Mr. Brennan, in your testimony this morning you referred to 50 acres which the City had available for commercial leasing some time prior to 1942. Do you recall that? A. Yes, sir.

Q. Will you state when it was that the City had that much? A. In 1940.

Q. Have you made any inspection since you testified this morning?

A. Yes, sir. When I came up this morning, I swore to tell the truth, the whole truth, and nothing but the truth, [352] and I have found out that the area the Navy took was taken prior to Pearl Harbor and I thought it was after Pearl Harbor. So that made quite a difference in the acreage. It took off some 20 or 25 acres.

(Testimony of Joseph W. Brennan)

Q. Then, will you state how much acreage the City had left of this aggregate of small parcels available for commercial leasing in November, 1942?

A. Between 5 and 10 or 15 acres, somewhere along there. I didn't check that.

Mr. Sloane: That is all.

Mr. Landrum: No questions.

Mr. Sloane: The defendant San Francisco Bridge Company rests.

The Court: Proceed with the evidence on behalf of the Tavares Construction Company and the others on whose behalf you appear.

Mr. John M. Martin: If the court please, and ladies and gentlemen, my name is John Martin. This is my brother Frank Martin, and this is Mr. Charles Crouch, who represent the Tavares Construction Company and also the Concrete Ship Constructors. The Tavares Construction Company is a joint adventure composed of several parties, Mr. Stroud, Mr. Seabrook, Mr. Elliott, Mr. Tavares, Mr. Page, and Mr. Gates.

You will hear, no doubt, in the evidence here of the Ship Constructors and the Tavares Construction Company, but it all means the same. Certain documents, I think, will be [353] offered in evidence which will have the name "Tavares Construction Company" on them, but it was all done for the benefit of the Concrete Ship Constructors.

We now come to the second phase of this case and that is the Tavares Construction Company interests or the Concrete Ship Constructors. I will endeavor to tell you what we will attempt to prove in this case. It is a little

bit complicated but I will try and outline it so that you will better understand it.

The first part of this case has to do with the land. The second step of the case has to do with the shipyard and the facilities and machinery constructed upon that land.

The Tavares Construction Company interests arose, as we intend to show, through a lease which we had with the government. That lease was in the name of the Defense Plant Corporation, and there, again, we will call it the government. The Defense Plant Corporation is a government agency. And you may hear also mentioned the United States Maritime Commission, which is still of the government.

There will be those leasehold interests which are involved in this case. I believe the court will instruct you to determine what the Tavares Construction Company's interests were arising out of that leasehold interest.

Going back into 1941, on December 27, 1941, the Tavares Construction Company then held a lease on what was known as [354] Parcel 1 from the City of National City. The Tavares Construction Company entered into an agreement with the government, through the Defense Plant Corporation, by which the Defense Plant Corporation was to build a shipyard on this Parcel 1. The Tavares Construction Company, as the evidence will show, was sort of a contractor to build those facilities. They built those facilities at cost, without any supervisory fee for their services.

Then, by that same agreement, we had an agreement of lease, which we will offer in evidence, dated December 27, 1941, by which the Defense Plant Corporation leased the shipyard to the Tavares Construction Company for use by the Concrete Ship Constructors in constructing

ships. The Tavares Construction Company stated in building a shipyard on Parcel 1 early in 1942.

Later on, as the evidence will show, it became desirable to increase the size of that shipyard, and that the government started out to condemn this entire area shown on the map. That was to be the site of this enlarged shipyard. This agreement of lease, made with the Defense Plant Corporation, was amended from time to time so as to cover the enlarged facilities and the entire site. [355]

We get down to the date of November 10, 1942, when the government filed this condemnation suit to acquire the title to the lands, the entire area of the parcels from 1 to 11, and parcel A. On the next day, on November 11th, the Defense Plant Corporation amended the agreement or the lease with the Tavares Construction Company.

Now, when we get up to that time, I would like to explain to you a bit what that lease covered. We intend to show by the evidence that under that lease, and the one which you are now being called upon to evaluate in this proceeding is the lease as it existed after November 11, 1942, which covered the entire parcel, that lease gave to the Tavares Construction Company certain rights. The evidence, we intend to show, will show that that lease ran until December 31, 1949. It provided for a termination at an earlier date at the option of either party, at any time when the use of that property or this shipyard was no longer needed for the construction of boats by the government. It provided that the Tavares Construction Company was to pay certain rents to the government, so much per ship constructed until the entire cost of all the facilities and the entire property had been paid for; in other words, until the government had gotten back all the money it had spent in constructing that shipyard.

I believe the evidence will show that that condition [356] arrived along about September of 1944, when the rental payments equaled the total cost to the government of the entire shipyard, plus 4 per cent interest on it.

From then on the Tavares Construction Company was to have the use of the property rent free. There are certain other rights granted in that lease. The evidence will show that, first, as I stated, there was to be no fee charged for the construction of the facilities, they were constructed at cost, and, also, there was a guaranteed cost on it, that it would not exceed so many dollars, and if it did, why, the Tavares Construction Company had to pay the excess. But in return for that the Tavares Construction Company had these possessory rights, they had certain options and they had the right to purchase the entire shipyard and all the land at the cost to the government, less a certain formula for the depreciation on the shipyards' facilities and machinery.

Now, we will show that that shipyard was designed and constructed for a post-war use. We will show that the basins—well, we will show that instead of building ships upon the land like most shipyards are constructed, where they construct the ship up on top of the land, and as you no doubt seen pictures of, when they launch a ship they slide it down into the water from a way; but this shipyard had basins which extended below sea level, and the ships were constructed down in that basin, and when they got ready to [357] launch the ship, they would raise the gate and let the water from the ocean into the basin, and they would float the ship, float it out through the

gate. That had a great advantage over other type shipyards, in that it could also be used as a dry dock for the repair of ships, and for other uses. For instance, all they had to do was to raise the gate, let the water in, float the ship out, then close the gate, pump out the water and then it was a dry dock and they could repair a ship there, paint it, do whatever they had to.

Now, along two years after the government started suit to condemn the land and take the property, on December 23, 1944, the government took our leasehold right. They took away from us the agreement or lease, and took away all of our rights under it. We intend to show by our evidence that that was a very valuable right, and while the government, as a sovereign power, has the right to take property from individuals, yet the Constitution says they shall receive just compensation therefor, and I believe the court will instruct you that is what you are to determine here: how much just compensation the Tavares Construction Company is to receive for these rights which have been taken away from them.

Thank you.

The Court: Proceed with the evidence. Call your witnesses.

Mr. Crouch: May we have a moment, your Honor? [358]

The Court: Surely.

Mr. John M. Martin: If the court please, John M. Martin speaking. I will call as our first witness Mr. Eisenman, who has previously been sworn and testified.

T. W. EISENMAN,

called as a witness by and on behalf of the Tavares Construction Company, having been previously sworn, testified further as follows:

Direct Examination

By Mr. John M. Martin:

Q. Mr. Eisenman, I will ask you if you have prepared a model to depict the condition of the shipyard as it existed on December 23, 1944?

A. Yes, I have prepared such a model.

Q. Have you also prepared maps to indicate the conditions and the soundings as they existed on that date?

A. I have prepared such maps.

Mr. John M. Martin: If the court please, I would like to produce the model and the maps at this time.

The Court: Very well.

Q. By Mr. John M. Martin: Are they in the adjoining room, Mr. Eisenman?

A. Yes, they are. I think we are going to need some help with them.

The Court: You will have to move that easel back a [359] little bit, so that the model can be placed on two chairs here, probably. Or, if you want to move that panoramic view there, the model can perhaps be placed on the table.

Now, have you all of the paraphernalia here?

The Witness: I think most of it. There is a little more out there, your Honor.[360]

Q. By Mr. John M. Martin: I will ask you, Mr. Eisenman, if you have placed the model so that it faces the same way as the land actually lies and the water.

A. I don't know what you mean by that, Mr. Martin. Do you mean in a true direction north?

(Testimony of T. W. Eisenman)

Q. Yes. Can we do that?

A. I don't know just where north is. Is it right through here?

Q. Is it approximately the same?

A. I would say approximately so. I imagine true north is about through here and true north on this map is about through here.

The Court: It isn't placed, then, in a position in which we find the literal National City here? It is on the Coronado side the way it lies, isn't it?

The Witness: What is the question?

The Court: Will you read it?

(Question read by reporter.)

The Court: That is, the way the model lies.

The Witness: I don't believe so.

The Court: Doesn't it?

The Witness: No.

The Court: All right; go ahead.

Q. By Mr. John M. Martin: Will you explain to the jury, Mr. Eisenman, whether this model was prepared to scale [361] and what the scale is?

A. Yes.

Q. And also explain to them anything else that you feel they need to understand from what you have attempted to depict thereon.

A. May I go down to the model? Q. Yes.

A. This model has been prepared on a linear scale of 1 inch equals 50 feet, that is, if we take a distance of an inch on the model, it would represent 50 feet on land, or I might say that the easterly boundary from here to this point here represents 1849 feet, and on the southerly boundary from this point here, which is the southeasterly

(Testimony of T. W. Eisenman)

corner, out to the pier head line, is a distance of 2172 feet. All the improvements shown hereon are to scale as nearly as we could make them. The wet docks or the dry docks are shown. There are the four of them as you have seen, and the other docks, the large gantry cranes, one for each dock, and one steam crane, and all the mill buildings, the light poles, the bulkhead storage racks, the pier and even down to the ships. These represent the last ships that were built. They are lighters. This vessel is 265 feet long and 48 feet wide. So that from that you can get an idea of the relative size of the various features. All of the electrical installation on the project is underground with the exception of the light poles. [362] The actual flood lights, to permit night working, represented a great expense and resulted in a very useful situation, so that the other cranes, the mobile cranes, such as truck cranes and other cranes that are not shown hereon, could operate through the yard without the interference of the overhead lines. The mold lofts are shown and you can see here that they are these on this large flat, plain surface, to be used as drafting tables, There is one here and one here. And then here are the assembly lofts for assembling the steel deck houses, and this area back through here is used for reinforcing steel storage. The reinforcing steel was actually worked in this area and back through here. Probably the largest reinforcing steel fabrication installation that was ever built in California was in this very area. The ships use a considerable amount of reinforcing steel and the steel had to be accurately fabricated, much more so than when it is used in connection with a building. That is why the reinforcing steel layout was so extensive. In addi-

(Testimony of T. W. Eisenman)

tion to that, you have your carpenter shops where the forms were made and repaired. You have your machine shop and your electrical shop and your compressor room, where the large compressors were installed to feed the compressed air to the project, and your warehouses here and here, the field office and administration building and personnel building, and another warehouse, and then the bulkhead storage racks. It was [363] found early in the shipbuilding program—

Mr. Landrum: Just a moment, if the court please. I do not feel the witness should go to that extent. He has now explained the model and we object to the statement he has made as being argumentative and evidentiary.

The Court: There may be a little deduction there in the last statement instead of being descriptive. Just confine yourself for the present to a descriptive narrative.

The Witness: I think probably I have covered the installation, unless there is some question that someone has.

Q. By Mr. John M. Martin: I would like for you to explain the location of the batching plant. Is that illustrated by your model?

A. Yes; the batching plant is on the easterly side of the project proper. It was separated by a right-of-way of the Santa Fe and the separation was so great on this southerly end, and there were so many tracks and features of the Santa Fe in here, that we built the batching plant on a separate little plat of its own, in order to eliminate the extra work that would be required in order to show the tie plant and so on that belongs to the Santa Fe. This batching plant was used all the way through the project for the dry batching of concrete aggregates, which con-

(Testimony of T. W. Eisenman)

crete aggregates came in by rail from the north, and we had a spur on each side. This spur here was at the site when we started building and this [364] spur here was added. The bins that you see here were where the aggregates were unloaded and stored. And a very special sand was required, that was manufactured originally at Otai. This sand was brought in by trucks and dumped over this runway into the bins and then it was brought out and up to the hopper, where it was dry mixed. It was hauled by truck over the public highway and then hauled to the mixers.

Q. Will you explain the location of the pier head line and the bulk head line on that model?

A. The bulk head line is right here. In fact, the bulk head is built along the bulk head line here. The first two docks were built on so-called Parcel 1 and they were built for the purpose of constructing only five ships and, in consequence, we didn't feel that it warranted the expense of moving out over the water to the bulk head line. On the original land, which is 80 feet in here, there was a dike and it ran down to the water here. It represents quite an expense to build a bulk head along this deeper water. So the first two docks were built back of this 80-foot offset line.

Q. Of what was the bulkhead constructed?

A. The bulkhead that is here is constructed of steel H piles and precast reinforced concrete slabs. It is quite a novel design that I don't believe has ever been used before. However, it resulted in quite an economic and satisfactory [365] bulkhead.

(Testimony of T. W. Eisenman)

Q. How is the pier line indicated on the model?

A. The pier head line is marked here with a little white tab, with typewriting on it, and also depicted by the line here.

Q. What is the distance from the bulkhead to the pier head line?

A. The distance from the bulkhead to the pier head line is 1,000 feet.

Q. And what do the various colorings in the water portion indicate?

A. The light green represents the areas as we found them, that is, in December of 1941, before we did any dredging. The light blue represents the area that we dredged 16 feet to provide an entrance from the channel. It was dredged 30 feet on the north and another entrance on the south. This square here was not dredged, as it was not required, and we didn't feel it required the extra expense. The area in that deep blue area adjacent to the pier was dredged to 20 feet and that was dredged in order that we might have deep water for those ships. It was required that those ships be tested much more severely than a steel ship, as they were in an experimental stage, and we used this.

Q. What was the approximate total area of Parcel A in acres? [366]

A. Parcel A is approximately 30 acres.

Q. Of that total 30 acres, what is the total area that you dredged?

A. Approximately 18 acres.

Q. Of what type of construction was the pier?

A. The pier was built on creosoted wood piles, with a flat slab concrete deck.

(Testimony of T. W. Eisenman)

Q. In general, what was the type of construction of the wet basins?

A. There are two types of construction used in the wet basins. On the original docks they were built with wood and sheet piles, that is, two large pieces of wood. In this case they were 8 x 12's and they had grooves in the sides of them, and each one of these sheet piles is driven one next to the other, and in those grooves there was a 2 x 4 to form an actual seal so the sand couldn't run in. And the bottoms of the docks were built with 14 x 14's on top of piles that were put there to stop the ship. As I recall, there were about 750 to 800 untreated wood piles in each dock for the purpose of supporting the ship. That applies to these two docks, Docks 1 and 2. Dock 3 and Dock 4 were built with steel sheet piles, a much more expensive type of installation and an installation that has a much longer life than the wood piles.

Q. How much longer life? Can you estimate for us the [367] difference?

A. I would say in my opinion about 40 years.

Q. What would you estimate the life of the docks 1 and 2? A. About 10 years.

Q. Have you prepared a map which shows the soundings that you took before you commenced dredging in Parcel A? A. Yes; I have.

Q. Will you produce that map here?

A. This is the map here.

Mr. John M. Martin: Let's hang it on the easel. If the court please, I offer in evidence, as Concrete Ship Constructors' Exhibit R, the model which I expect to use for purposes of illustrating the testimony which will follow.

(Testimony of T. W. Eisenman)

Mr. Landrum: Is R the correct initial, Mr. Clerk?

The Clerk: Yes; R.

Mr. Landrum: No objection to R, your Honor.

The Court: It may be received and so marked.

(The model referred to was received in evidence and marked Defendant Concrete Ship Constructors' Exhibit R.) [368]

[Defendants' Exhibit R—Model of shipyard as of December 23, 1944. See original.]

Mr. John M. Martin: We offer in evidence as Concrete Ship Constructors Exhibit S the map which the witness has just presented.

Mr. Landrum: No objection to Exhibit S, your Honor.

The Court: So received and so marked.

(The document referred to was marked Concrete Ship Constructors' Exhibit S, and was received in evidence.)

[Defendants' Exhibit S—Map of shipyard of December 23, 1944. See original.]

Q. By Mr. John M. Martin: Now, Mr. Eisenman, one further question about the model. I notice numbers are shown on each of the major facilities here depicted. What number have you used?

A. The numbers shown hereon are the page numbers in the Defense Plant Assets-Property Record, which described in detail each of these features, together with the cost and all the pertinent information for each feature.

(Testimony of T. W. Eisenman)

Q. Does the map which you have just produced show those same numbers? A. It does.

Q. So that the same statement would be true with reference to the map? A. That is correct.

Q. Now, will you explain to the jury and to the court what you have attempted to depict upon this map, particularly with reference to the soundings, by whom they were made, the [369] approximate date, as to parcel A?

A. This map is virtually a plain reproduction of the model or of the site which is represented by the model. In addition, it has the soundings shown in the Bay, the soundings that were taken in the fall of 1941 and the spring of 1942, or the winter of 1942. These soundings, as has been explained before, represent the elevations of the land prior to our dredging, and show the distance above or below mean low low water that the land was in each position when we first started our investigation for the development of the shipyard. Also, there is shown hereon the areas that had been dredged. The area that has been dredged minus-16 is the area that is shown in the light blue there. The area that has been dredged minus-20 is shown in the dark blue.

It will be noted on the westerly side of the dredging that the dotted line that outlines the dredging does not go quite to the channel. The reason for that is that from here to the channel the water depth was in excess of the 16 feet that was required, so there was no dredging necessary. The same here on the south.

(Testimony of T. W. Eisenman)

Q. Can you give us, Mr. Eisenman, the approximate cost of the dredging that was performed by Concrete Ship Constructors prior to the date of November 10, 1942?

A. The approximate cost of the dredging prior to what date? [370]

Q. Well, first give us the total date, if you desire, and then approximate that portion prior to November 10, 1942.

The Court: Total date,—what do you mean by that?

Mr. John M. Martin: I beg your pardon. The total amount.

The Witness: The total expenditure for dredging was approximately \$109,000. As I recall, that represented approximately, oh, around three hundred ten or three hundred fifteen thousand yards, and as I understand it, as I checked the record here a short while ago, I believe that about \$74,000 worth of dredging had been accomplished at the date referred to.

Q. By Mr. John M. Martin: You mean on November 10, 1942? A. November 10, 1942.

Q. Can you give us an approximation of the total acreage involved in the total site of this shipyard?

A. The total site, including all the land, as well as the so-called water or land, was approximately 100 acres. That is on this side (indicating), not including the batching plant.

Q. Is the map which you have identified drawn to scale?

A. Yes, it is drawn to the same scale as the model, of 50 feet to the inch, and shows all the features that the model shows. [371]

(Testimony of T. W. Eisenman)

Q. Does the map accurately portray the site, as it existed on or about the 23rd of December, 1944?

A. It does.

Q. In other words, there had been no dredging done at a date which is not reflected by the figures you have just given?

A. I am sorry. I don't understand you.

Q. In other words, there had been no dredging performed in addition to the \$109,000 value you have given?

A. Up to 1944, December, 1944?

Q. Yes, up to December 23, 1944.

A. That is correct.

Q. Does the model, in your opinion, fairly accurately depict the conditions as they existed in the shipyard on December 23, 1944?

A. It does.

Q. You may be seated. Oh, just a minute. Have you also prepared other maps here?

A. Yes, I have some photostats of some maps from our files.

Q. What, in general, do they show?

A. Well, you will note that this large map does not include the batching plant. They show the batching plant.

Q. Can you tell us when you first commenced actual dredging on parcel A? [372]

A. August 28, 1942.

Q. Can you give us the date when you first entered upon and commenced work on the other parcels, by number?

A. I am afraid I can't. On the other map the dates are so stated. I can give the approximate dates, but to the day, I couldn't do it.

(Testimony of T. W. Eisenman)

Q. Were some of those before November 10th and some subsequent? A. 1942?

Q. 1942.

A. Yes, I believe that—no, I believe that all of the parcels had been occupied by November 10, 1942. There is one question in my mind; parcel 8, but I don't believe we have a record of that.

Q. Is there anything in these other maps which you feel is essential to a complete understanding? I note the map you have just prepared or identified does not show the batching plant; is that correct?

A. That is correct.

Q. And the other maps do show the batching plant?

A. They do, and that is the only addition, is the batching plant.

Q. For the time being I will not offer them, Mr. Eisenman. A. Fine. [373]

Q. Have you also some photographs, that were taken by you, which fairly depict the condition of these facilities as they existed on December 23, 1944?

A. I have.

Q. Just be seated. I hand you a photograph which bears the date on the reverse side of November 15, 1942, and ask you if you took that picture.

A. Well, I couldn't say whether I personally took the picture. If I didn't take it, it was taken under my direction. I may have taken the picture.

Q. Can you say whether it accurately sets forth the condition of the facilities as they existed on about that date? A. It does.

Mr. Landrum: There is no objection to that when we get a number for it, your Honor.

(Testimony of T. W. Eisenman)

Mr. John M. Martin: I offer it as Concrete Ship Constructors' Exhibit T.

The Court: So ordered.

(The document referred to was marked Concrete Ship Constructors' Exhibit T, and was received in evidence.)

[Defendants' Exhibit T—Photograph of shipyard or portion thereof. See original.]

Q. By Mr. John M. Martin: I hand you, Mr. Eisenman, a photograph which bears the date August 25, 1944, and ask you if that picture was either taken by you or under your [374] direction.

A. I personally took this picture.

Q. You believe it to fairly show the condition as it existed within the view of that picture on that date?

A. Yes.

Mr. Landrum: No objection to that picture, your Honor.

Mr. John M. Martin: I offer it in evidence as Concrete Ship Constructors' Exhibit U.

The Court: So received.

(The document referred to was marked Concrete Ship Constructors' Exhibit U, and was received in evidence.)

[Defendants' Exhibit U—Photograph of shipyard or portion thereof. See original.]

Q. By Mr. John M. Martin: I hand you a photograph dated August 25, 1944, and ask you whether that picture was taken either by you or under your direction.

A. I believe I took the picture personally.

(Testimony of T. W. Eisenman)

Q. You think it fairly states the subject?

A. It does, well.

Mr. John M. Martin: I offer in evidence the photograph just identified as Concrete Ship Constructors' Exhibit—

The Clerk: V.

Mr. John M. Martin: —V.

Mr. Landrum: No objection to what I understand has been marked U, your Honor, nor is there any objection to Exhibit V.

The Court: Very well. So ordered. [375]

The Witness: There is a duplication there, your Honor. There are two pictures there that are the same. Two of those pictures are the same.

The Court: The witness says those are the same. There are so many pictures here that they will not be illustrative. Can't you limit the number of photographs?

Mr. Landrum: It has been a little confusing to me, your Honor. There were some photographs introduced just like this, I think, by the City of National City, but I don't know whether they are duplicates or not.

Mr. John M. Martin: I am endeavoring to avoid a duplication, if the court please. That is the reason for the delay.

The Court: The witness might be able to assist you.

The Witness: There is only one duplication there.

Mr. John M. Martin: That is all the photographs I desire to offer at this time, because I do not care to duplicate. I want to check further.

The Clerk: Do you withdraw Exhibit V?

The Court: There are two Vs here now.

The Clerk: V is the same as U, your Honor.

(Testimony of T. W. Eisenman)

The Court: That is the same photograph.

Mr. John M. Martin: I would like to substitute what I now offer as Exhibit V, and withdraw the original exhibit V.

The Court: All right. So ordered. [376]

Q. By Mr. John M. Martin: I ask you if what purports to be a picture, which I now hand you, and which has been identified as Exhibit V,—I will ask you to state what it is.

A. This is an aerial photograph made by the United States Navy for Concrete Ship Constructors, and we requested that this photograph be made for our use in the construction of the yard, for planning purposes. The date, I believe, was stamped on the back here. June 14, 1943. It shows a view, a vertical view of the entire yard layout.

Mr. Landrum: There is no objection to Exhibit V, your Honor.

Mr. John M. Martin: I offer the aerial photograph as Exhibit V.

The Court: So received.

(The document referred to was marked Defendant Concrete Ship Constructors' Exhibit V, and was received in evidence.)

[Defendants' Exhibit V—Airview photograph of shipyard. See original.]

Mr. John M. Martin: May I now hand these photographs to the jury?

The Court: Yes. You had better have that last one marked, first.

(Testimony of T. W. Eisenman)

Mr. John M. Martin: Yes.

(The photographs were handed to the jury.)

Q. By Mr. John M. Martin: Mr. Eisenman, will you use [377] Exhibit V, and with your pointer indicate thereon the location of the same area that is depicted by the map and the model which is received in evidence?

A. I will.

Q. —so that the marginal limits may be known to the court and jury? A. Yes.

Mr. Landrum: Shall I help you hold it?

The Witness: Let's turn it around so it is about the same as the model.

You can see here is this pier, this north line, this line here is right out through here. It runs off the picture at this point for a short ways. Then the east line runs right down along here. You can see the fence almost going right down there. The south line, this line here, runs right in front of the Administration Building, and heads out towards the pierhead line. The pierhead line would be about out here, as you can see on the model.

Mr. John M. Martin: You may cross-examine.

Cross Examination

By Mr. Landrum:

Q. Mr. Eisenman, I would like to ask you just a few questions.

Mr. Landrum: This is probably not exactly cross examination, your Honor. [378]

Mr. John M. Martin: So far as I am concerned, I will not object upon that ground, if the court please.

Q. By Mr. Landrum: For the purpose of the record, I want to try to clear up who is the Tavares Construction

(Testimony of T. W. Eisenman)

Company, who is the Concrete Ship Constructors, and what the relationship of yourself and Mr. Tavares and Mr. Seabrook and Mr. Elliott is. Is it all the same thing when you get down to the bottom of it?

A. Well, I can probably answer it best by telling you what each entity is. The Tavares Construction Company—

Q. Well, counsel in his opening statement said, "When we refer to one, it is all about the same thing." I would like to get that in the record.

A. Well, the Tavares Construction Company is a California Corporation. Concrete Ship Constructors is a joint venture composed of Tavares Construction Company, Lloyd Stroud, R. S. Seabrook, and C. M. Elliott.

The Court: That is an unincorporated entity?

The Witness: An unincorporated entity.

Q. By Mr. Landrum: I want to know whether or not the Concrete Ship Constructors claim an interest through the lease of the government of the United States or the Defense Plant Corporation to Tavares? That is what I am trying to get at.

Mr. John M. Martin: If the court please, I think counsel [379] had better answer that question. As a matter of fact, it is covered by a stipulation made on pre-trial. The fact is that all of the rights held by Tavares Construction Company were held in trust for the use and benefit of the joint venture, doing business under the firm name and style of Concrete Ship Constructors.

The Court: There is a stipulation.

Mr. John M. Martin: That is true.

Mr. Landrum: I didn't know that. That is what I wanted to know, your Honor. That is all.

(Testimony of T. W. Eisenman)

Mr. Sloane: I have a question.

Q. By Mr. Sloane: Mr. Eisenman, I am interested in the subject of dredging which you touched upon.

A. Yes, sir.

Q. I understood you to say that prior to November 10, 1942 there had been no dredging in the area referred to.

A. No dredging by Tavares Construction Company.

Q. There had been dredging by others?

A. I am sure there must have been.

Q. Do you know who did that dredging, and where?

A. Well, not to my certain knowledge. I understand that the San Francisco Bridge Company did dredging in that area.

Q. When did your dredge start work in the area?

A. August 28, 1942. [380]

Q. Can you tell us where they first started to dig?

A. Yes. I can probably show you best. The first work was started in this area here (indicating). The reason for that—

Mr. Landrum: For the purpose of the record will you state where you were pointing?

The Witness: I was pointing to the area south of the finger pier, just bayward from the bulkhead line.

The Court: That is in parcel A?

The Witness: That is in parcel A. The reason it started there, the first ship was built in this dock.

Q. By Mr. Sloane: I didn't ask for the reasons. So far as my question goes, I simply wanted to locate it.

(Testimony of T. W. Eisenman)

Now, can you tell us or indicate on your model where parcel 7 has its northerly boundary?

A. Well, parcel 7 would be approximately in the area that lies toward the water from where the pointer is.

Q. You are indicating the northerly boundary as falling approximately half-way between the drainage dock—

A. Well, the northerly boundary is right along this telephone post, a sloping line that came against here (indicating), something like that.

The Court: Are you pointing out in the terrain?

The Witness: Well, it goes out in the water there. The line would come through up in here (indicating), starting [381] from the bulkhead line. As I recall, this property is about 205 feet perpendicular to about 218 or 219 feet on the slope here. Then it runs parallel, southerly and parallel to this line down to a point that is about 200 feet or so south of this mole line, where they intersect here. The exact distances I don't remember.

The Court: That isn't a portion of the area in which there was any dredging that you testified to?

Q. By Mr. Sloane: That is the land portion?

A. That is the land portion.

Q. The dredging would be towards the water from the portion you just described?

A. Yes.

Mr. Sloane: I don't want to disturb this work of art, but could I get you to make a little bracket in red where parcel 7 would follow in its extent north and south?

Mr. John M. Martin: Would it answer the same thing to put it on the map?

Mr. Sloane: Well, I don't know if I am smart enough to transfer it from the model to the map. I want to get it on both.

(Testimony of T. W. Eisenman)

Mr. John M. Martin: Very well.

The Witness: May I refer to the exhibit up here, which has some dimensions on it.

Mr. Sloane: Yes. [382]

The Court: Refer to those by Exhibit numbers, the exhibit on the stand.

Mr. John M. Martin: May we approach the bench, your Honor?

The Court: Yes.

(A discussion was had between the court, Mr. John M. Martin and Mr. Landrum, outside the hearing of the jury, as follows:)

Mr. John M. Martin: I desire to call as my next witness our accountant, who prepared this exhibit Q which has been received in evidence, and have him very briefly explain what it shows. Now, I have had extra copies of that exhibit made so that the jury, instead of having to make notes, may have that copy before it, with the long descriptions of each piece of property identified on the map and identified on the model, with the record of whatever the cost, as shown by the government's records was. The jury can't make notes of all of that and it seemed to me since I have extra copies that I might properly have the jury have them, with the court's explanation of what counsel and I have agreed to as to the admissibility of the exhibit.

Mr. Landrum: The government will object to that tabulation being given to the jury, your Honor, and to each of them having a copy of it upon the ground and for the reason that under the stipuation it is absolutely unnecessary. We have [383] agreed to the amount of

(Testimony of T. W. Eisenman)

the depreciated value, and I see nothing to be gained by handing them a tabulated statement of evidentiary matter.

The Court: If the copies are true copies of that exhibit,—

Mr. John M. Martin: They are.

The Court: —and contain nothing but what is on the exhibit,—

Mr. John M. Martin: Yes.

The Court: I should think that would facilitate matters, rather, for them to have 12 copies of the exhibit instead of having them pass one copy around amongst them.

Mr. Landrum: I don't have any particular objection, except the general objection that the jury is then carrying around a lot of papers.

The Court: Oh, we will not let them carry them around. They will have to leave that here when they leave the court room.

Mr. Landrum: Then I don't have any objection, your Honor.

Mr. John M. Martin: I wish to use the same practice also when I call Mr. Tavares and have him explain a calculation that he has made as to the fair market value of these facilities or as to the replacement cost. It will identify the same figures as used in this, but will illustrate the [384] calculation, and after that has been received in evidence, if it is received in evidence, I would like for the jury to have a copy of what has been received in evidence so they may follow the figures of the calculation.

Mr. Landrum: I don't see any necessity at all, your Honor, in view of the fact I have stipulated as to what the figures are.

(Testimony of T. W. Eisenman)

Mr. John M. Martin: No, the exhibit I am talking about now is one I have here. This is one I haven't had a chance to hand you. It will be an exhibit showing tabulated figures that he has made as an expert in calculating the fair replacement cost of the facilities and machinery as of December 23, 1944, and he takes as his basis the actual cost as set forth in Exhibit Q and shows the facts that it does not include.

The Court: I do not believe that is the proper way to proffer an instrument.

Mr. John M. Martin: I will not offer the duplicates. I will simply offer the original and after the original is received in evidence, then, in order that the jury may have some memorandum of those figures, and so as to follow the evidence, ask to hand them a copy.

The Court: I think that is what we have a reporter here for, to take down the evidence.

Mr. John M. Martin: Very well.

The Court: The reporter has to write it all down, and [385] then you can refer to it in your argument, but I do not believe it is proper to follow the other course.

Mr. John M. Martin: Very well.

The Court: The objection is sustained.

(Thereupon the proceedings were resumed within the presence and hearing of the jury:)

Q. By Mr. Sloane: Mr. Eisenman, you have drawn a light red line on the model, showing the outline of the property which was under lease by the City of National

(Testimony of T. W. Eisenman)

City to the San Francisco Bridge Company; is that correct?

A. I have drawn the land portion of it, which I know to have been under lease, and have also indicated a water portion that I have been told has been under lease.

Q. Yes. Now, with reference to the water portion, am I right in saying that that had been dredged to a depth of 10 feet before you began your dredging, and that you then dredged it down to 16 feet?

A. Well, I would say that the soundings would display the depths to which it was dredged. I have never observed whether or not that entire portion was dredged to 10 feet prior to our occupation.

Q. At any rate, what you did was to begin with the bottom, as it was in November, 1942, on November 10th, and then went deeper to reach a total depth of 16 feet?

A. That is correct. [386]

Mr. Sloane: That is all.

Mr. Muir: May I ask the witness one question on behalf of the Johnsons?

The Court: That is what I wanted to avoid. I am going to avoid it from now on, but since I have permitted other counsel, you may proceed.

Q. By Mr. Muir: Mr. Eisenman, my one question is with reference to the batching plant of the Concrete Ship Constructors, being this part of the model (indicating), was that located on the Johnson's property?

A. A portion of the batching plant was on the Johnsons' property.

Q. Could you indicate on the model how much of it?

A. Well, I might be able to. I may need some reference on that, too. A little stretch of land here that start-

(Testimony of T. W. Eisenman)

ed in here at 15th Street, 15th Street is here (indicating), and the land was just wide enough to allow this ramp to come up. Then it went down to 14th Street, which, as I remember it, should be about here (indicating) on the model. [387]

Mr. Muir: The witness indicating, in pencil, the area referred to.

The Witness: Something like that, sir; this from here up to here; the narrow street from 15th up through approximately to 14th, and then the rest of Johnson's property, including half of a vacated street here.

Mr. Muir: That is all. Thank you.

Mr. Landrum: I would like to ask one or two questions on cross examination.

Cross Examination

By Mr. Landrum:

Q. Mr. Eisenman, what would you call the heart or the most important part of that shipyard? The most important part of that shipyard is where you build the ships, isn't it? A. These docks.

Q. And are you now pointing to right through here where the San Francisco Bridge Company had a lease?

A. No, sir. I point out another water front where these docks are built.

Q. You pointed in here, didn't you?

A. That is 1, 2, 3, 4; yes.

Q. The San Francisco Bridge Company had a lease which was about like this? You have marked it on here. That is right, is it not? [388]

A. That is correct.

(Testimony of T. W. Eisenman)

Q. Would your shipyard have been any good without any of the land?

A. This portion of it, we wouldn't have built the docks on. We would have probably built here if we didn't have that land.

Mr. Landrum: All right; that is all.

Mr. John M. Martin: Mr. Smith, please.

GREGORY SMITH,

called as a witness by and on behalf of the Concrete Ship Constructors, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Gregory Smith.

Direct Examination

By Mr. John M. Martin:

Q. By whom are you employed, Mr. Smith?

A. The Concrete Ship Constructors and the Tavares Construction Company.

Q. In what capacity?

A. In an administrative capacity.

Q. During what period of time have you held that position? A. Since January 9, 1942.

Q. Are you familiar with the Defense Plant Corporation [389] records relative to the facility construction and cost of construction at this shipyard?

A. I am, sir.

Q. Have you from those records calculated the actual cost as to the various items of the facilities and machinery and calculated the depreciation thereof, as set forth in the lease? A. I have, sir.

(Testimony of Gregory Smith)

Q. And prepared a writing which has been received in evidence here through agreement of the government and counsel for the Concrete Ship Constructors, Exhibit Q? I hand you Exhibit Q.

A. Yes, sir. This is it.

Mr. Landrum: If the court please, may the record show we stipulated and agreed that Exhibit Q was a correct calculation of the depreciated value of those facilities, in accordance with the contract between the parties?

Mr. John M. Martin: It is so stipulated.

The Court: So understood. Ladies and gentlemen, this instrument has been prepared conjointly and co-operatively by the litigants in this case. It may be so considered.

Q. By Mr. Martin: Do you have additional copies of that, so that I may use them, Mr. Smith?

A. Yes. How many copies do you want?

Q. Will you give them to me, please? [390]

A. How many do you want, please?

Q. Enough so that counsel and each member of the jury and the court may have one.

Mr. John M. Martin: With the permission of the court, I am handing to each member of the jury a copy of Exhibit Q.

Mr. Landrum: If the court please, I thought that was what we discussed at the bench. Wasn't it?

The Court: No. We discussed other matters. Ladies and gentlemen, this is simply for your convenience and facility. You are not to read into this copy anything that is covered by the stipulation which I just told you about. This document and instrument was prepared conjointly and it was agreed between all of the litigants that it cor-

(Testimony of Gregory Smith)

rectly portrays the matters that are stated herein. There is nothing else to be inferred from this instrument except anything that would logically and reasonably be inferable from that statement. And each of you please leave those documents here when you leave tonight. Don't take them home with you. Leave them here for your use later on. Proceed.

Q. By Mr. John M. Martin: Mr. Smith, you prepared this exhibit at my direction? A. Yes, sir.

Q. And you prepared it using your copy of the Defense Plant Corporation asset record?

A. The asset property record. [391]

Q. As to this type of shipyard? A. Yes, sir.

Q. I note that this exhibit shows a number. For instance, the first item there says, "Schedule 1-A." What is meant by "Schedule 1-A"? Does that refer to the formula set forth in the lease, the Defense Plant Corporation lease?

A. This 1 and 2 are handled together as one classification and the rest of the schedules follow the formula.

Q. By the "formula" you mean the formula for depreciation? A. Yes, sir.

Q. And this next number showing, for instance, "1101"—what does that indicate?

A. That is a page of the asset property record.

Q. And the numbers, for instance, that are shown on this model or on the map that has just been received in evidence—do they mean and refer to the same numbers as you have set forth in this lease?

A. They refer to the same numbers as set forth in this lease.

(Testimony of Gregory Smith)

Q. For instance, the item you show as No. 2101 is electric shop and compressor building? A. 2102.

Q. By that I am to understand that No. 2102 on either the map or the model referred to the same structure? [392] A. That is right.

Q. Namely, the electric shop and compressor building?

A. Yes, sir.

Q. Following, under the heading of "Description"; is the description as there set forth also taken from the government record?

A. Yes, sir. It has been condensed in some cases.

Q. Then, on the final page of Exhibit Q, you have a recapitulation or a summary sheet. Will you state and briefly explain what you have endeavored to show and how you have arrived at that recapitulation?

A. I have endeavored to show the option price applying to each classification of the facilities and machinery, the rates of depreciation called for under the formula, and deducting that depreciation from the original cost and arriving at a depreciated value or the option price.

Q. What did you find the total original cost to the Defense Plant Corporation of the facilities and machinery here constructed and installed to be?

A. \$2,647,067.95.

Q. You have made a calculation of the total amount of depreciation of the facilities and machinery down to December 23, 1944. Where do you show that figure and what is the amount of such depreciation?

A. On the last sheet it is shown at the bottom of the [393] column headed "Depreciation," and the amount is \$505,831.46.

(Testimony of Gregory Smith)

Q. Then, in arriving at the option price, you have deducted from the total cost allowable depreciation under the terms of the lease, to December 23, 1944, and arrived at an option price of what amount and where is it shown?

A. The last figure in the last column on the final summary sheet, \$2,141,236.49.

Q. Will you state the total amount of rental paid by the Concrete Ship Constructors to the Defense Plant Corporation, under the terms of its lease, for the use of the facilities and machinery here involved?

A. \$2,775,807.01.

Q. And that payment was made as of what date?

A. The last payment was made on October 5, 1944.

Q. And that was in full payment of rental due under a statement from the Defense Corporation to you as of what date?

Mr. Landrum: Just a moment. That is objected to, if the court please, first, upon the ground and for the reason that there is no foundation laid; second, upon the ground and for the reason that it is rental due them for what? It doesn't say what for. And at this point, if the court please, I feel I should object to any further testimony with relation to these matters until the foundation is laid for them, that is, the contract between the Defense Plant [394] Corporation and these defendants.

The Court: I thought that was covered by the stipulation. Maybe not.

Mr. John M. Martin: No, your Honor; it is not covered by the stipulation. It is covered by the stipulation in a lump sum approximation, with the right reserved to counsel or the government to prove a larger amount. The amount recited in the stipulation is a figure of \$2,700,000,

(Testimony of Gregory Smith)

and I have attempted to show by this witness the accurate amount.

Mr. Landrum: But, if your Honor please, I think that the Tavares Construction Company and the Concrete Ship Constructors must prove their ownership. That statement is from Plancor 407. That, together with its amendments and the contract for the construction of ships, we feel should be in evidence as a foundation for this testimony.

Mr. John M. Martin: If the court please, the stipulation of facts made on the pre-trial refers to and identifies both the leases and amendments and the shipyard contracts are attached to the declaration of taking on file in the files before your Honor. I am perfectly willing to produce by this witness copies of those leases or copies of the originals for examination by government counsel, or I will offer in evidence copies, whichever he prefers. I do not think that the ship contracts as such are material in any way to the record in this case. [395]

Mr. Landrum: If your Honor please, I am very happy to accept counsel's proposition and I will make no objection if they are just copies. In so far as the ship contracts are concerned, I would like to approach the bench to state our position on that.

The Court: It is now time for the afternoon recess, and I think I will excuse the jury and take our recess now and hear you on that in the absence of the jury. Ladies and gentlemen, we will take a recess for a few minutes. Remember the admonition and please occupy the jury room.

(Thereupon, in the absence of the jury, the following proceedings were had:)

The Court: I find here this stipulation and agreed statement of facts and separate joint motions of counsel for the plaintiff and the defendant, Tavares Construction Company relative to the submission of this case.

Mr. Landrum: We have agreed that that is not to go in.

Mr. John M. Martin: No; I am not offering the stipulation as such to the jury. What I did want to do, though, to avoid that, was to offer, for the purpose of this record, certain portions of that general stipulation which we both deemed to be material, in other words, to avoid the proof.

Mr. Landrum: On the question that is now before the court, I have objected to any further testimony unless the [396] foundation is laid. I have asked that they be required to put into evidence the contract which exists and was entered into between the Defense Plant Corporation and this defendant, on and by virtue of which they are in this court.

Mr. John M. Martin: No objection to that at all.

Mr. Landrum: Together with the amendments to that.

Mr. John M. Martin: No objection to that.

Mr. Landrum: Together with the instruments referred to in that contract, namely, their contracts with the Maritime Commission for the construction of ships.

The Court: All contracts?

Mr. Landrum: I understand there are only three of them. Plancor 407 provides this lease may be terminated and canceled whenever the contract for the construction of ships with the government is finished.

Mr. John M. Martin: I have the originals here for your examination and you may read any portion of them into the record.

The Court: Why do you want to encumber the record with the whole of those contracts?

Mr. Landrum: Those contracts provide the dates on which these ships were to be delivered.

The Court: Can't you select those dates from the instruments and agree upon them?

Mr. Landrum: Oh, yes. My only thought about it was [397] this. The government's theory here may be entirely different from the defendants. We have Plancor 407 which is the real agreement, which is tied into this Maritime agreement for the construction of ships, and that they had been completed prior to December 27, 1944.

The government takes the position that has a great effect on the value of this lease.

The Court: That is an argument, isn't it, on the effect of it? What we are trying to do is to see whether there is any difference between you and what is to go into the record here.

Mr. John M. Martin: We have no objection to that.

Mr. Landrum: Counsel is willing that the original lease, Plancor 407, and all the amendments, go in.

Mr. John M. Martin: And I want the privilege of handing the jury, each one of them, a copy.

Mr. Landrum: No objection to that.

The Court: Is that what you have here?

Mr. John M. Martin: Yes, your Honor.

The Court: Then, it is agreed that the original agreement of lease, dated December 27, 1941, with the amendments thereof, known as Plancor No. 407—have you examined this?

Mr. Landrum: Yes, sir; many times.

The Court: Mr. Clerk, mark this as an exhibit, Tavares Construction Company next exhibit, whatever it will be. [398]

The Clerk: Exhibit W.

[Defendants' Exhibit W—Agreement of Lease (Plan-cor 407) between Defense Plant Corporation and Tavares Construction Co., Inc., dated December 27, 1941 and amendments thereto. This is same as Exhibit 1 attached to Amended Declaration of Taking and copied herein at pages 49 to 96.]

The Court: Exhibit W will be in evidence, then, by consent. And the record may show, also, gentlemen, that counsel for the Tavares Construction Company produced at least twelve true copies of Exhibit W and it is agreed between the parties that such copies may be delivered to the jury, for their inspection, for the purpose of facilitating following the testimony, and they are to be left in the court room as each session is concluded, and not carried away by the jurors. Is that satisfactory, gentlemen?

Mr. Landrum: Yes, your Honor.

Mr. John M. Martin: Now, if the court please, in a pre-trial conference between government counsel and myself, at which the court was not present, in an effort to avoid getting a lot of facts before this jury that we both deemed were immaterial, we both agreed that the stipulation on pre-trial in toto should not be handed to the jury; that as to the first eight paragraphs as therein stipulated to,—that those facts should in some appropriate manner be made known to the jury.

The Court: I will call your attention to these marks. They are my marks, gentlemen.

Mr. Landrum: It was stipulated between us that as to the first eight paragraphs, by someone, they should be made known to the jury. [399]

Mr. John M. Martin: Also, I believe there is another paragraph or two that I marked in your copy, that I can identify, that was, likewise, to be made known to the jury.

The Court: That is just a historical statement.

Mr. Landrum: That is all, your Honor.

Mr. John M. Martin: I wanted paragraphs numbered 26 and 27 made definite as to the dollar figure and I wanted paragraph No. 29 made known to the jury.

The Court: Is there any objection to that?

Mr. Landrum: He has already proved Nos. 26 and 27 by this witness, but I have no objection at all to it, and I am perfectly satisfied that they put in No. 29, your Honor.

The Court: 26, 27 and 29?

Mr. John M. Martin: Yes, your Honor.

Mr. Landrum: That recites the consideration that they paid for this lease and option.

The Court: Very well, if it is agreeable.

Mr. Landrum: Could I read No. 29 again, your Honor? That is perfectly all right. That is the truth.

Mr. John M. Martin: Bearing upon paragraph 29, I intend to offer proof as to the consideration with which we parted, in other words, as to the fair value of that supervisory fee. Normally, that would have nothing to do with the normal measure of compensation. It has nothing to do with the market value but I am taking the position that, where the [400] United States Government has granted by contract, to my client, certain rights, and then has seen fit, by eminent domain, to acquire from my clients those rights, then the very minimum they

should recover would be the consideration with which they parted. Otherwise, I would have filed suit in the United States Court of Claims for just compensation for the consideration we had in that property. Where the government sees fit to file an action in eminent domain, that one element of compensation to be considered is the right, the chose in action, the right of my client to sue the government in the Court of Claims, and of which right my client is thereby deprived. We no longer have any right to sue in the United States Court of Claims because of the declaration of taking and because of the eminent domain proceedings following the declaration of taking.

Had they not brought this action, my remedy then would have been in the United States Court of Claims and they would have applied the rule of just compensation. I do not see how they can reduce the just compensation or deprive me of that as an element of compensation merely by selecting this as a forum in eminent domain and condemning it.

Mr. Landrum: I don't understand counsel's idea at all.

The Court: What has the jury to do with that problem?

Mr. John M. Martin: They have only this to do. That very right that my client had under this contract has been [401] acquired by the government. One of the rights it would have had, had it not been for this declaration and by the filing of this suit in eminent domain subsequent to the declaration of taking, would have been to have filed suit in the Court of Claims to recover back the fair value of the consideration with which it parted. That consideration here was, first, an assignment, at an acquisition cost of \$1 to the United States, of the original 20-year leasehold estate that we held at National City. We parted with that. These lease agreements so show. The

other consideration would be the fair value of our supervisory service. We went to work down there and constructed those facilities. The government comes in and takes it away from us by condemnation and it acquires a contract which would have been the contract upon which I would have brought my action in the Court of Claims.

We no longer can sue in the Court of Claims for that reason. If your Honor doesn't feel that that is true, then I want this record made with a ruling so that, when I am through here, I can go to the United States Court of Claims.

Mr. Landrum: If the court please, the government has not raised the question of jurisdiction. I understood that what was before the court was simply this, that he wished to prove paragraph 29, or whatever it is, to this jury.

Mr. John M. Martin: That is right, and, in addition, to [402] prove the fair value of the supervisory fee there referred to.

Mr. Landrum: I am not objecting to that. I was going to try to prove it myself.

The Court: Are you together now?

Mr. Landrum: I have been hoping he would do that. I am not going to object to him putting in testimony with relation of how much would be a fair fee for the supervision.

Mr. John M. Martin: Plus the fact as to what the jury has to do with that. If I am strictly limited to the normal rule of eminent domain, then I am limited to the fair market value of my leasehold estate.

The Court: We will cross that bridge when we come to it. I haven't had from any of you yet your requested instructions, and I want them when we recess tomorrow night, at least.

Mr. Landrum: You will have mine tomorrow morning.

The Court: What I want to know is whether you gentlemen are together on the factual presentation of what you want to present to the jury.

Mr. Landrum: No, your Honor. We seem very far apart. I can't get counsel's theory. If it is that he is entitled to claim some compensation from the government of the United States in a condemnation case for the reason it took away from him his right in the Court of Claims— [403]

The Court: There are, of course, certain rights terminated by eminent domain proceedings. Sometimes those rights are such as, in the absence of the sovereign power, would not be considered just.

Mr. Landrum: He certainly is not going to try a case before the Court of Claims and this jury, too.

Mr. John M. Martin: I am of the opinion that you have raised the jurisdiction again on me. If the court can accord me the same right as in the Court of Claims—

The Court: You need not have any fear but what the court, in so far as it can, will permit the jury to find just compensation for the taking which the government has accomplished.

Mr. John M. Martin: Then I don't need a requested instruction.

Mr. Landrum: I will say this, and I say it advisedly, that there are a good many more instruments of this kind. There are a lot of instruments that were signed up long after this case was brought. If counsel is going to be permitted, and I know he is not, to go and talk about the right to sue in the Court of Claims.—

The Court: No; he wouldn't be permitted to discuss that. The court has stated that, as a matter of law, with-

(Testimony of Gregory Smith)

out indicating anything further at this time, the case will be submitted to the jury upon the theory that the jury shall fix [404] just compensation for the taking that has been accomplished by the government at the time applicable to the case.

Mr. Landrum: May we have a little further recess, your Honor?

The Court: Yes.

(A short recess was taken.)

The Court: All present. Proceed.

Mr. John M. Martin: If the court please, I would like to have the last question to the witness read.

The Court: Very well.

(The question was read.)

The Court: You had better read back a little bit to give the context.

(The record was read by the reporter.)

Q. By Mr. John M. Martin: You may answer.

A. July 10, 1944, with interest to August 1, 1944.

Q. Is that the last statement for rentals ever received by the Concrete Ship Constructors from the government? A. Yes, sir; it is.

Mr. John M. Martin: You may cross-examine.

Cross Examination

By Mr. Landrum:

Q. Mr. Smith, taking up that last question, did I understand you to say that, under date of October 5, 1944, the Concrete Ship Constructors made the last payment of [405] rents which was due under and by virtue of the original agreement between the Tavares Construc-

(Testimony of Gregory Smith)

tion Company and the Defense Plant Corporation in connection with this yard? A. That is correct, sir.

Q. Mr. Smith, isn't it a fact that this exhibit contains, within itself, a clause to the effect that this yard may be used by the Concrete Ship Constructors for the construction or for the repair work of boats and things for private individuals, provided they receive the consent of the Defense Plant Corporation?

A. I don't believe the contract calls for that.

Q. I don't want to take up time, but I can call your attention, I think, to paragraph 22.

Mr. Landrum: As I understand it, your Honor, this Exhibit W is in evidence.

The Court: That is true.

Q. By Mr. Landrum: Mr. Smith, calling your attention to paragraph 22 of Exhibit W, do you have a copy of it? A. No, sir.

Mr. John M. Martin: Here is one.

Mr. Landrum: I understood, your Honor, that these copies were to be also given to the jury and they might have permission to have a copy of the contract.

The Court: That was the understanding; yes. The same thing is true with these copies, ladies and gentlemen. [406] They are for your use in the court room and later on in the jury room when you deliberate, but you are not to take them from the court house during the progress of this case, and at each adjournment you will leave with the clerk, so that they will be available to you the following day. And the record may show that each juror now has a copy, I presume, of Exhibit W. Now, each juror has a copy.

(Testimony of Gregory Smith)

Q. By Mr. Landrum: Mr. Smith, calling your attention to paragraph 22 of Exhibit W, which is in evidence, in this case, it reads, "Twenty-two: Lessee may use such site, facilities, and machinery only for the construction by lessee of boats for sale to the government, unless otherwise permitted in writing, by Defense Corporation, with the consent of the Maritime Commission noted thereon. Lessee also agrees that so long as this lease or extension thereof remains in effect it will eliminate all charges (including all charges for amortization and depreciation), exclusive of the rental, maintenance, taxes and insurance provided for herein and ordinary operating expenses, for the site, facilities and the machinery to be provided hereunder, from any price charged the government." Have you read that? A. No, sir.

Q. Isn't it a fact that the Concrete Ship Constructors did, pursuant to that clause 22 of that contract, request permission of the Defense Plant Corporation to use these [407] facilities for the construction by or for operation of private individuals? A. Yes, sir.

Q. That is right, isn't it? A. Yes, sir.

Mr. John M. Martin: If the court please, I object to this line of questioning unless it be confined to the period prior to the declaration of taking, December 23, 1944. Manifestly, the lease ceased to exist on that date, as a matter of law, and I would like for this line of questioning to either be confined to the period ahead of the taking by the government or that I be given an opportunity to separately object to it.

The Court: I think, where you have gone into that phase of the case in the direct examination, the government should be permitted to explore it so that the jury

(Testimony of Gregory Smith)

will have the whole picture before it, as to what the financial settlements and transactions were pursuant thereto.

Mr. John M. Martin: I, if the court please, limited my examination to prior to December 23, 1944. I stopped at that date.

The Court: The objection is overruled.

Q. By Mr. Landrum: I understood you, Mr. Smith, in response to my question, to say that your company had made such a request. [408]

A. Yes, sir; it has.

Q. Can you tell us when they made it?

A. I don't recall.

Q. If I would call your attention to about the month of October, 1944 — well, no; February, 1945 — state whether or not your company did not apply to the Los Angeles agent of the Reconstruction Finance Corporation for the use of these facilities, for the repair of ships, for parties other than the government, and request the consent of the Maritime Commission.

Mr. John M. Martin: To which I object, if the court please, on the ground it is immaterial to any issue in this case and not a matter of proper cross examination, as counsel on direct examination confined his testimony to a date prior to the taking.

The Court: It may be a matter of defense strictly instead of cross examination. I think perhaps it is.

Mr. Landrum: Could I approach the bench, your Honor?

The Court: No; I don't think it is necessary to approach the bench. I am not foreclosing the government from showing what money, if any, was paid to the defendant in this case.

(Testimony of Gregory Smith)

Mr. Landrum: Your Honor, might I be permitted to state my position? I don't want to argue the matter. This witness was asked whether or not he had received a final statement of rent, all of the rent that they owed the government. That [409] is the question counsel put to him and he said yes. We had better have the record read if there is confusion as between counsel as to what period was covered in your question. I understand you to assert, Mr. Martin, that you limited your inquiry to the period up to the time of the declaration of taking.

Mr. John M. Martin: And, also, I limited it to the payment of rental under this Plancor 407 and, also, of payments under the lease. I did not go into any detrimental arrangement that might exist in this matter.

The Court: We will have to have the record read on that if you are not together on the question.

Mr. Martin: I would like to ask the witness whether the figures he gave as to the amount of rentals were limited to Plancor 407.

Mr. Landrum: Oh, no.—

The Court: We must control the case in an orderly fashion. I will have to have that record read. You may pass on to some other phase of the examination. I am frank to say I haven't any independent recollection as to whether counsel did confine his questions on that phase of the inquiry to a period up to the time of the declaration of taking. If he did not, you are correct, but, if he did, you are incorrect.

Mr. Landrum: Your Honor, I will defer it until such time as we may have the record read. [410]

Mr. John M. Martin: I would like, on redirect examination, to ask one question—

(Testimony of Gregory Smith)

Mr. Landrum: Just a moment. I am not through cross-examining this witness.

Mr. John M. Martin: Oh, pardon me.

Q. By Mr. Landrum: Mr. Smith, you were the gentleman who did the work or the majority of the work in the preparation for use of this tabulation which shows the depreciated value of the facilities here, were you not?

A. Yes, sir.

Q. Now, I think, in order that the jury may more definitely understand just what this is, I will ask you what did you use as a basis for the tabulation which is in the jury's hands. What did you get it from?

A. From the Assets Property Records.

Q. When you say the Assets Property Records, Mr. Smith, what you really mean is that you took this from the invoices which covered the facilities and the property and things which were made to the Tavares Construction Company? That is right, isn't it?

A. That is what the property records were made up from.

Q. In other words, you had what we call invoices for each article that you have here, didn't you?

A. Yes, sir.

Q. And that money was paid out by whom? [411]

A. Paid out by the Defense Plant Corporation.

Q. That is right; by the Defense Plant Corporation. In other words, will you tell us, just briefly, how that transaction went?

A. Apparently there was a lot of paper work.

Q. The invoices are about that high, aren't they? Indicating about six inches?

(Testimony of Gregory Smith)

A. That is right. The purchases were approved by the Defense Plant Corporation representatives. The copies were audited by their auditors and then we presented to the Defense Plant Corporation the certificate for payment directly to the vendor, or, in the case of those items which we had disbursed ourselves, like pay rolls, for reimbursement to ourselves.

Q. And then the Defense Plant Corporation would pay out the money? A. Yes, sir.

Q. The total amount, as exhibited by this exhibit, that the Defense Plant Corporation paid for the construction of this shipyard, was \$2,047,067.95? That is your total, isn't it? A. Yes, sir.

Q. Taking this exhibit which the jury has, the property record, plus schedule 1-A, page 1101, now that 1101 is actually the number of the invoice, isn't it? [412]

A. No.

Q. What is it?

A. That is the page of the Assets Property Record.

Q. And that was made from the invoices and made up of several charges that comprised the item. And what does "1-A" mean?

A. That is the schedule of factual appendix A, which was also prepared by the Defense Plant Corporation.

Q. That "1-A"—does that tie back into the contract, Plancor 407?

A. 1 and 2 form one schedule under Plancor 407.

Q. What I am trying to get at is what you did here was to take the contract Plancor 407 and take those records and then figure the depreciation in accordance with the contract, didn't you? A. Yes, sir.

(Testimony of Gregory Smith)

The Court: In accordance with the formula set up in the contract.

Mr. Landrum: Yes, sir; all right.

The Court: There are two methods there?

The Witness: Yes, sir.

The Court: And these two methods correspond to 1 and 2 of this exhibit?

The Witness: No, sir.

1 is the first item and Formula B of the contract. [413] This is all under Formula B.

Q. By Mr. Landrum: The contract, in paragraph 15, Plancor 407, which is in evidence in this case, provides the foundation and the method for your depreciation which you figured on here, doesn't it?

A. That is right, sir.

The Court: And you have only taken one of those formulas there?

Mr. Landrum: If your Honor please, it is B because A won't apply. We have agreed on that.

Mr. John M. Martin: If the court please, I haven't agreed that Formula A is not applicable.

The Court: In any event, it is Formula B which the computation was made upon?

The Witness: Yes, sir.

Mr. John M. Martin: That is correct.

The Court: And not Formula A?

The Witness: That is right.

Mr. Landrum: The computation A was made as though they would exercise the option under Formula B.

Q. Now, Mr. Smith, I notice in that exhibit that there is a charge. You call it pro rata of service costs—

(Testimony of Gregory Smith)

Mr. Crouch: If I may be permitted to suggest, I think counsel and the court and the jury can follow the matter if he will indicate the page he refers to. [414]

Mr. Landrum: It is on the last page—well, no—next to the last page.

Mr. Crouch: The exhibit is paged.

Mr. Landrum: Down in the bottom there it says, "2501-2, pro rata of service costs."

Mr. Crouch: On what page?

Mr. Landrum: Next to the last page.

Q. Now, will you tell us how much the total service cost charges here were?

A. It is shown under the grand totals on the summary sheet, sir.

Q. How much is it? A. \$235,662.26.

Q. \$235,662.26? A. Yes, sir.

Q. What are service costs?

A. In this particular case the service costs were the engineering, the accounting that was necessary for the project, the pay roll, taxes, social security, and compensation insurance and clerical costs.

Q. Now, within those service costs I call your attention to what we know as item 2, 23(c). Do you need this paper? A. It might be helpful.

The Court: What is the paper you refer to?

Mr. Landrum: It is a memorandum he made himself, your [415] Honor.

The Court: It hasn't been offered in evidence, has it?

Mr. Landrum: No. I don't intend to offer it. What my concern is with is item 3, 23(c), \$8,595.52.

Q. That is not shown on this record that the jury has, is it? A. No.

(Testimony of Gregory Smith)

Q. But within those service costs are included \$8,595.-52. Now, you tell us what that was for.

A. I gave you a memorandum on it, but I will tell you.

Mr. Landrum: I have the paper that will answer that, your Honor.

A. That portion of the management's salaries that were applicable to the construction and acquisition of these facilities.

Q. \$8,595 for somebody's salaries. Whose salaries?

A. The managers.

Q. Who were the managers?

A. Mr. Tavares, Mr. Seabrook and a portion of my salary is included in there. Incidentally, there is a credit of \$1275.10 which was charged back against that, which is also on the Property Assets Record.

Q. Do you mean to say there should be twelve hundred and some odd dollars deducted from the salaries which were paid? A. That would probably be the case. [416]

Q. Would you be good enough to figure this so that we can get the figures accurately?

A. On the back of page 2501 on the Assets-Property Record is a credit for readjustment of managers' salaries.

Q. Then tell us when you make that adjustment, Mr. Smith, how much is included in that 2501-2 for salaries paid to the officers of the Concrete Ship Constructors in connection with this building of this shipyard?

A. The difference between those two amounts.

Q. Will you figure it for me, please?

A. \$6,869.82.

(Testimony of Gregory Smith)

Q. Who paid them?

A. The Defense Plant Corporation paid all their salaries.

Q. Now, I want to call your attention to item 9(23m) in the sum of \$1,380.55, which has been included in this tabulation which we have made. Can you tell us what that \$1300 which the Defense Plant Corporation paid was for? A. \$1,380?

Q. Yes, whatever it is, please, sir.

A. That is for vacation and holiday pay.

Q. For whom? A. For the clerical employees.

Q. That did not include Mr. Tavares and you?

A. No. sir. [417]

Q. All right. Now, I will have to come back up here because we have only one paper. Calling your attention to a charge for engineering, that is item 4(36A), \$26,-834.57, who did the engineering?

A. Which item is this?

Q. That item for engineering, please.

A. \$26,834?

Q. Yes, sir.

A. Well, my answer to you on this memorandum is our own construction naval architects and structural engineering department's salaries.

Q. It is the salaries in the engineering departments of the Concrete Ship Constructors?

A. That's right, sir.

Q. Now, there is one further item, item 6(23B) on the records, \$9,433.64 for purchasing. Now, what does that mean? A. Our purchasing department.

(Testimony of Gregory Smith)

Q. Your purchasing department. In other words, that was the salaries of the purchasing department of the Concrete Ship Constructors?

A. That portion—that was applicable to the purchase of items for the Plancor 407.

Mr. Landrum: Now, if your Honor please, with the exception of the matter which we left undeveloped, that is all I [418] have from this witness at this time.

Mr. John M. Martin: I would like to ask him a few questions on redirect.

The Court: Yes.

Redirect Examination

By Mr. John M. Martin:

Q. Mr. Smith, were all the items about which counsel has just cross-examined you included in the amounts which the Concrete Ship Constructors were to repay to the Defense Corporation as rental?

A. Will you reword that, please?

Mr. John M. Martin: Read the question, please.

(The question was read.)

The Witness: Yes, they were.

Q. By Mr. John M. Martin: And what was the total amount of the rental repaid prior to December 23, 1944?

Mr. Landrum: Your Honor please, that is repetition. We already have it in.

The Court: I think so. That is, we are still uncertain, all of us, as to whether it was tied definitely to that date.

Mr. Landrum: I am perfectly willing to stipulate, for the purpose of the record, that the last payment which was made of rentals under that contract to be paid out of the

(Testimony of Gregory Smith)

construction of ships was made on the 5th day of October, 1944. [419]

The Court: But the question was not limited to the construction of ships. Was it, Mr. Martin?

Mr. John M. Martin: I intended to limit it to Plancor 407, which is our Exhibit W, and also to payments made prior to December 23rd, 1944.

Mr. Landrum: I don't know, if your Honor please, what counsel's purpose is, but your Honor will recall that your Honor wished to have that record read.

The Court: I still desire to have it read because you are not together.

Mr. John M. Martin: If I have misunderstood the figure which the witness gave, or just so I may understand it, I desire at this time to prove the total amount of rentals actually repaid under this agreement, Exhibit W, prior to December 23, 1944.

Mr. Landrum: We won't have any argument about that. He has given the figure.

Mr. John M. Martin: He can give it again.

The Witness: \$2,775,807.01.

Mr. Landrum: That is already in.

Mr. John M. Martin: That is all.

Mr. Landrum: Now, if your Honor please, I said on this other matter—

The Court: Yes, we will have to clarify the other situation. [420]

Mr. Landrum: Then I have no further questions of the witness at this time.

(Testimony of Gregory Smith)

The Court: Have you some other questions, Mr. Martin?

Mr. John M. Martin: Oh, I have some more questions, if the court please.

Q. By Mr. John M. Martin: Mr. Smith, how many ships was Concrete Ship Constructors to build in all?

Mr. Landrum: That is objected to, if the court please, upon the ground and for the reason that it is not the best evidence.

The Court: Sustained.

Mr. John M. Martin: I withdraw the question.

Q. By Mr. John M. Martin: Mr. Smith, when was the last ship delivered to the Maritime Commission, actually finished and ready for delivery?

A. May 14, 1945.

Q. As of December 23, 1944, how many ships remained to be finished?

A. Two ships; two repair ships.

Q. On what date were they actually completed?

Mr. Landrum: If the court please, I am going to object upon the ground and for the reason that it isn't the best evidence. We have the original contracts for the construction of those ships with the Maritime Commission right here.

The Court: That is true. It is not the best evidence, [421] and in orderly procedure the writing ought to be produced. I don't see why you cannot agree upon a matter of that kind.

(Testimony of Gregory Smith)

Mr. John M. Martin: The matter I am asking, if the court please, is not set forth in the contract. There was an estimated date of completion set forth in the contract, and I am inquiring of the witness only as to the actual date of the completion.

The Court: There must be a memorial as to the actual date of completion. I apprehend there would not be a contract with such inexactitude that they would not have a memorialization showing the steps which had to be taken during its performance.

Q. By Mr. John M. Martin: Is there any record, Mr. Smith, to your knowledge, showing a memorial on the part of the contracting parties, and by that I mean between the government or the Maritime Commission and Concrete Ship Constructors, setting forth the actual date of the actual completion of the last ship?

A. We have the receipt by the government of the delivery of the last ship.

Q. Do you have that with you?

A. No, sir, I do not.

Q. Will you endeavor to produce it so that we will have it in the morning? A. Be glad to. [422]

Q. Can you tell me the approximate state of completion of these last two ships as of December 23, 1944?

A. I could not.

Mr. John M. Martin: That is all.

The Court: Is that all?

Mr. Landrum: I would like to ask him one or two more questions.

(Testimony of Gregory Smith)

Recross Examination

By Mr. Landrum:

Q. How many contracts did the Concrete Ship Constructors have with the Maritime Commission for the construction of ships? A. Five.

Q. And the first four of those contracts, had they been fully completed on December 23, 1944?

Mr. John M. Martin: To which I now object, the same objection counsel made me. We will shorten this case, if we can, apart from technical proof, and I am willing to stipulate that the witness may testify as to the actual date of completion of any ship built by my clients.

The Court: Of course, the ruling would work as to both sides.

Mr. John M. Martin: That is right.

The Court: And it does work both ways, and your objection is sustained. [423]

Q. By Mr. Landrum: Then one further question. I understood you to say, Mr. Smith, that on December 23, 1944, there were only two ships yet to be delivered.

A. That is correct, sir.

Mr. Landrum: I believe that is all.

The Court: Have you some other witness that you can use now?

Mr. John M. Martin: Yes. I am ready to proceed.

(Witness excused.)

Mr. John M. Martin: I will call Mr. Tavares.

CARLOS TAVARES

called as a witness by and on behalf of the defendant Concrete Ship Constructors, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: Will you state your name, please?

The Witness: Carlos Tavares.

By Mr. John M. Martin:

Q. Where do you reside, Mr. Tavares?

A. La Jolla.

Q. Where were you born?

A. I was born in Shanghai, China.

Q. When? A. In 1905.

Q. How long did you live in China? [424]

A. I lived there until 1924.

Q. And of what nationality?

A. Portuguese.

Q. Portuguese. When did you first come to America?

A. When I came here to school.

Q. When was that? A. In 1924.

Q. And what school did you attend?

Mr. Crouch: Will the witness speak a little louder, please? We can't hear over here.

The Court: Yes, will you raise your voice a little?

The Witness: University of Notre Dame.

Q. By Mr. John M. Martin: Do you hold any degree? A. Yes.

(Testimony of Carlos Tavares)

Q. What?

A. Bachelor of Science, Civil Engineering.

Q. From what school?

A. From that same school.

Mr. Crouch: We still can't hear him.

The Witness: From that same school.

The Court: This is a hard room in which to hear, and it is no reflection on any witness to have that said, but if you can keep your voice up as much as possible, it will help.

The Witness: All right. I will. [425]

Q. By Mr. John M. Martin: You received that degree in Civil Engineering from Notre Dame in what year?

A. The class of 1927.

Q. Will you just briefly relate what your business activities were subsequent to that date?

A. I returned to Shanghai and joined a firm of engineers as a draftsman at \$120 a month. In about a year I was made assistant engineer and I ran the show. I became a partner there, a junior partner, and my duties consisted in designing and contracting. We did a lot of work. We designed rabbit filters, sedimentation tanks, water works, concrete, reinforced concrete buildings.

I severed my connection after working for about two years with this firm and went to Hong Kong to investigate the new type of piling that was being used at that time. I came back to Shanghai and started the Shanghai Vibro Piling Company, and was made manager of it at a salary of \$1500—

(Testimony of Carlos Tavares)

Mr. Landrum: Just a moment; if the court please, I don't think it is necessary for him to recite his income.

The Court: I don't believe it is. That is not always the proper estimate of qualifications.

Q. By Mr. John M. Martin: Well, in any event, it is an issue which is not material here, and he was probably paid the salary, and if not, we are not able to collect it now. So if you will skip the salary and boil it down to the [426] important things, showing your training and experience leading up to the ship construction.

A. I stayed with this company for about two years, when I joined another company and was made a junior partner of it. When I was with that company we did an awful lot of heavy construction work.

Q. What was the name of that company?

A. A. Corritt Company.

Q. And where was its principal place of business?

A. Its principal place of business was in Shanghai.

Q. That was during what period?

A. That was during 1932 and to 1937. During that time we were both contractors and engineers. We designed piers for the Standard Oil Company, the Shell Oil Company, Jardine along the Bund in Shanghai. We designed a dry dock for the Kiang Nan dock. We did an awful lot of work. We built some piers in Tsing Tau. We built the Shung-Tang bridge, which is the largest bridge in China. We designed and built it. We specialized in foundation work of all types, particularly under-

(Testimony of Carlos Tavares)

water work. We drove the longest pile in the world. We drove the deepest pile under compressed air, 126 feet below water, and while we were finishing and completing that job in 1937, we were bombed by the Japs, and we completed the job. I came to Los Angeles for a holiday in 1937, and I tried to look for some work, and I [427] couldn't find any. So I started my own company, and I found a job in Long Beach of the Ford Motor Company that was deteriorating, all the piles were going to rot, so I thought that would be a pretty good job for me to tackle. I didn't have an awful lot of money at that time, but I managed to borrow, and had about, probably—

Mr. Landrum: Just a moment.

Q. By Mr. John M. Martin: Leave out the dollars, please. A. All right. I will leave that out.

Mr. John M. Martin: A lot of us were hard up in those times.

The Court: I think we had better suspend with that.

Mr. John M. Martin: Yes.

The Court: Now, ladies and gentlemen, if you will leave those papers here during the recess and you will get them back tomorrow morning.

We will take a recess until half past nine in the morning, and, ladies and gentlemen, remember the admonition.

(Whereupon, at 4:40 o'clock p. m., Wednesday, February 19, 1947, an adjournment was taken until 9:30 o'clock a. m., Thursday, February 20, 1947.) [428]

San Diego, California, Thursday, February 20, 1947,
9:30 A. M.

CARLOS TAVARES

the witness on the stand at the time of adjournment, having been previously duly sworn, was examined and testified further as follows:

Direct Examination (Resumed)

By Mr. John M. Martin:

The Court: All present. Proceed.

Mr. Landrum: If the court please, might we approach the bench for a moment?

The Court: Yes. The answer of the defendant Leonard McLaughlin may be filed as of this date.

(The following proceedings were had without the hearing of the jury:)

Mr. John M. Martin: If the court please, it is on page 394 the question starts and page 405.

Mr. Landrum: I think so, your Honor. I haven't read the record but Mr. Martin showed it to me this morning and I think he is correct.

The Court: If you want to make a statement to the jury, you may do so.

Mr. John M. Martin: In the stipulation we agreed upon yesterday, by which the stipulation of counsel on the pretrial would not all go to the jury as such, I eliminated [430] everything in the way of correspondence or factual data occurring subsequent to December 23, 1944. I do not deem it material to the issues of this case to receive evidence of any dealings my client had with any department of the government relative to the use of this property subsequent to the date that this ceased to exist. It

was for that reason that I agreed to exclude all of the correspondence in our stipulation and all of the factual statements of matters that had occurred subsequent to December 23, 1944. Now, if counsel for the government should be permitted to open that up and put on factual proof of what transpired subsequent to December 23, 1944, then I will have to offer that stipulation myself to prove those facts.

Mr. Landrum: That is not what counsel for the government proposes to do but, if they come in here and make certain assertions, for instance, that they had a right to use that yard for private enterprise, without payment of rent—

Mr. John M. Martin: There is no such assertion.

Mr. Landrum: Well, it was made in the opening statement by Mr. Martin and it is shot all through this case. If they make any such claim as that, we are entitled to show, as an admission against interest and in rebuttal of that statement, that they did agree to pay a certain amount. If they come in here and say, "In my opinion, this is worth \$3,000,000," and I take this witness and say, "Mr. Tavares, did you know [431] that day before yesterday it was testified it was worth \$3,000," I think that it is proper as an admission against interest.

Mr. John M. Martin: I am making no such statement.

The Court: Where was his statement? I don't remember what he said.

Mr. Landrum: They made the statement and they claimed during the trial of this case that they had the right to use this yard without payment of rent.

Mr. John M. Martin: Oh, no.

Mr. Landrum: You tried to show you had a lease there without payment of rent, and that is not true.

Mr. John M. Martin: If the court please, at no time have we contended nor do we now contend that we had any right to the free rent use of any part or portion of this yard, its facilities or machinery, for any purposes other than ship work for the United States government.

Mr. Landrum: Here is another angle to the case, if your Honor please,—

The Court: Why can't you dispose of that matter by a concession in the presence of the jury?

Mr. Landrum: I am perfectly willing to do that but I think it would be material—if your Honor please, the thing we are concerned with here is the valuation of that leasehold interest. If they contend for a lease, the value [432] of that lease is dependent upon how much it costs them to stay in that shipyard. They have expenditures for insurance, for taxes, for guards, and all of those things. Now, if they contend that that leasehold has a value, what it will cost them to have that leasehold is admissible as going to the question of its value. We propose to show that they did have those expenses and that they even asked the government to pay a part of them.

The Court: I think you are unnecessarily complicating the problem. The law of the case has been established as to the right to compensation for the leasehold. It is the option feature, of course, that is the only complex situation in the case. Otherwise, the General Motors principle and the principle laid down in the other cases that have followed the General Motors case are clearly determinative of the leasehold question, and that is going to be followed in this case. We are not going to overrule the principle of the General Motors decision for the injury that the lessee is put to by reason of the lawful termination of this lease.

When it comes to the question of value of the option, it seems to me that the case can be simplified by the optionee preserving in the Court of Claims anything subsequent to the date of the termination of the project.

Mr. John M. Martin: Our theory is that there is a dead-[433] line, that there was a deadline, of December 23, 1944, the date when the government took, by operation of law, our leasehold estate, and as to this lawsuit I am limited to the market value of that.

If, by virtue of some other contract with the government, they have agreed with me that I possess certain other rights covering the period subsequent to December 23, 1944, such rights are not involved.

The Court: Do you take any different position?

Mr. Landrum: No, your Honor. My position is simply this, that it is true that we are fixing the just compensation as of December 23, 1944, for the taking of this lease (coupled with an option), but I contend that the question of how much that is worth is what is before this jury now. If I could say to the witness, "Mr. Witness, in case you did retain that lease that you are claiming was valuable, how much would you have to pay out in costs—"

The Court: That is all within the terms of the date of fixation.

Mr. John M. Martin: That is right, and I have no objection to that line. That was all I was asking for. I asked him if it wasn't a fact they had to pay rental at the rate of 10 cents—

The Court: Anything that comes within the period up to December 23, 1944, is a relevant matter to this case. Any-[434] thing that occurred subsequent to that is not relevant in this case. I am not saying that there may not arise in some other forum a claim for structure breaches and so forth, for damages of that kind.

Mr. Landrum: I am afraid I am not getting my point over to you. I am sorry. To boil it down, it is simply this, your Honor. If they are in this case contending that they had the right to stay there, the right to possession under that leasehold, I am entitled to show how much that right of possession would have cost.

Mr. John M. Martin: We do not contend we had a right to stay there after it was condemned.

The Court: How could they contend that they had a right to stay there after the government terminated the contract?

Mr. Landrum: No, your Honor; I am not saying it that way. That isn't what I say. In arriving at the value of this lease, counsel said in his opening statement that they had a lease under which they could stay there until 1949.

Mr. John M. Martin: We couldn't once the government terminated it.

The Court: That was a pure prospective eventuality and that prospective eventuality was terminated by the government.

Mr. Landrum: And the question is how much have they lost by reason of our termination of it. And what they lost must be determined by what it would cost to keep it. [435]

Mr. John M. Martin: There is no objection to that.

The Court: You don't seem to be at variance on that.

Mr. John M. Martin: Your Honor, I am in rather a peculiar situation. My position here is that my client has another agreement, that is not involved, dated August 9, 1945, by which the Maritime Commission has agreed that, for instance, my attorney's fees are an item of expense.

The Court: Of course, you can't determine those here.

Mr. John M. Martin: No; I don't want to do it and I don't want it before the jury. But, if counsel for the government starts to go into all of the contracts my client has entered into since December 23rd—

The Court: He says he is not going to do that and, if he attempts to do so, he will not be permitted to do it.

Mr. John M. Martin: I want a separate right to go to the Court of Claims—

The Court: I have been trying, as far as we can, to keep this case separate and apart from any additional claim that the defendants may have against the government, which is litigable in the Court of Claims, and we will do that by adhering to that deadline of December 23, 1944. Anything that occurred subsequent to that is irrelevant to this issue unless the defendants bring it in themselves, and, if they do, then you have a right to respond to it.

Mr. Landrum: Could I ask your Honor this? I trust that [436] your Honor will indicate whether you think it is correct or not. It is, if the question is the value of that leasehold interest, then may I not be permitted to show how much it would cost them?

The Court: I don't know what you will be permitted to show. I think I know the rule established by those cases which were mentioned.

Mr. Landrum: I am very familiar with the *Petty Motors* and the *General Motors* cases.

The Court: Then, why don't you follow the doctrine of those cases? I am not going to overrule the Supreme Court. They fix the rule pretty strictly here. Let's follow the Supreme Court. [437]

(Thereupon the proceedings were resumed within the presence and hearing of the jury:)

Mr. Landrum: If your Honor please, for the purpose of the record, I desire to withdraw the question which I asked the witness who was then on the witness stand, and with relation to which your Honor was going to look into the record.

Mr. John M. Martin: Mr. Tavares, please.

CARLOS TAVARES,

called as a witness by and on behalf of Defendant Concrete Ship Constructors, having been previously sworn, resumed the stand and testified further as follows:

Direct Examination (Continued)

By Mr. John M. Martin:

Q. As I recall, Mr. Tavares, when we adjourned yesterday you had been engaged in an attempt to briefly state the experiences that you had prior to the occurrence of the facts involved in this case that bore upon your educational or technical qualifications in connection with ship construction. Will you begin where you left off, as nearly as you can, and briefly finish your statement?

A. I was building the Ford job at that time, wasn't I?

Well, I got this contract from the Ford Motor Company.

The Court: Raise your voice, please, Mr. Tavares, or they will not be able to hear you. [438]

The Witness: I got this contract from the Ford Motor Company to undertake the rebuilding of their dock in Long Beach. This contract was awarded me. While I was not the low bidder, they awarded this contract to me.

(Testimony of Carlos Tavares)

Mr. Landrum: Just a moment. If the court please, I hardly think that is proper. It is argumentative.

The Court: It sounds as though it might be.

Q. By Mr. John M. Martin: We do not want any argument, or anything except those things you know of your own knowledge, Mr. Tavares. The reason that may have prompted the Ford Motor Company to have awarded you the contract is not here material. You will simply state the nature of the work and any special features of it which you think may have entered into your qualifications for your subsequent ship construction work and the construction of these facilities. By the way, what do you mean when you say "facilities"?

A. The facilities in the shipyard.

Q. Yes. What portion of it is correctly referred to? What do you refer to as facilities?

A. The facilities and machinery in the shipyard are everything that you see on that model that is necessary to build ships with.

Q. You mean it includes all types of equipment and machinery used in ship construction?

A. That is right. [439]

Q. It does not include the site itself, as we use the term? A. No.

Q. Now, what type of work was this Ford contract?

A. It was repairing and replacing the piles under water, the jacking up of certain portions of the building that had settled and—

Q. Did it require any particular engineering skill, in your judgment? A. Yes, it did. It required—

(Testimony of Carlos Tavares)

Q. What?

A. Well, it was a job that was never done before, and the methods which were used were very novel; and it is too long to go into, to explain what that was, but I can assure you it was.

Q. Very well. Let's pass to the next work that you performed, that you take into consideration in the statement of your experience and qualifications.

A. Well, the next job I performed was raising the Bridge of the Gods, which was the second largest single span, and is over the or right close to Barnevale Dam over the Columbia River. It was a 1500-foot-long bridge, which had to be raised 45 feet in the air. That was a job that only three—or, four contracting firms were qualified to bid on. I happened to be one of them. [440]

Q. Was it more or less difficult from an engineering standpoint than the General Motors job you referred to—I mean, the Ford Motor job you referred to?

A. There is no difficult engineering job if you work at it and know your job.

Q. What did you then do, following the raising of the bridge?

A. I then lowered the locks at Salido up near the Dalles, which was another difficult engineering job.

Q. That is on what river, and where?

A. That is on the Columbia River in Washington—in Oregon.

Q. Were there any other major construction jobs that you care to mention?

A. Oh, there are lots of them. I think it will take a long time to mention them here.

(Testimony of Carlos Tavares)

Q. Very well. Are you a citizen of this country?

A. Yes, sir.

Q. When were you naturalized?

A. I applied for my citizenship as soon as I came over, and I finally got my papers in 1941.

Q. You are an American citizen now?

A. Yes, sir.

Q. Now, will you briefly state what, if any, investigation you made as to the availability or suitability of [441] shipyard sites for the construction of facilities and machinery for ship construction for the government, prior to the time that you actually commenced or selected the location of the site here involved.

A. I scoured the countryside from San Francisco, Los Angeles, Newport Beach, and San Diego. I looked at sites in San Francisco. I looked at sites in Los Angeles, and I came down here to look at the various sites that were available. While it is true there were no other sites in San Diego available at that time, actually available, there was one site at the end of 28th Street that was available, that is to say, I could have gotten it by using—buying somebody else out of the picture and moving them off, and working a deal, anyway. I discarded all the sites in Los Angeles as completely not feasible for the kind of wet basins that we had in mind. These wet basins could not be built in Los Angeles economically. The condition of the Los Angeles soil is such that a 10-foot-thick concrete slab would have had to be put at the bottom of these basins. Also, the excavation costs would have been somewhere in the neighborhood of \$5 to \$10 a cubic yard alone for dewatering. By that I mean that when you dig a hole in the ground in most harbors in the

(Testimony of Carlos Tavares)

country you will find silting material and the water will come up and you have to resort to a lot of extra pumping and a lot of extra cost. [442]

While I thought this site was a very excellent site, the ground condition was one of the most important things that made us select this particular site, because when I took our original scheme to Washington the plant engineer there asked me, or he said, "Mr. Tavares, that is going to cost an awful lot of money. You are going to get yourself into an awful lot of trouble trying to build something like that, when you say you can build it for so much money."

I just said, "Well, that is my business, and it was my business to find out."

Also, in going over these various sites, I didn't find anything at that time that was, in my opinion, suitable for the type of operation that we had in mind. I was acquainted with Portland, Oregon, San Francisco, the back country at San Francisco, Los Angeles Harbor and San Diego Harbor. I did work also—at that time I was building a bridge close to Stockton across the Colony River. So when I say that this site was the only one for my operation on the West Coast of California, I mean where a shipbuilding plant such as I envisioned could be built economically.

Q. Was there a maximum amount in dollars in your agreement as to the moneys that would be available to you for the construction of this shipyard?

Mr. Landrum: That is objected to, if the court please. It is not the best evidence. I understand the agreement is [443] in evidence here.

The Court: I think it is, yes.

(Testimony of Carlos Tavares)

Mr. John M. Martin: I don't care to show the amounts. I would like to show that from time to time, as the shipyard was enlarged, the amounts were increased.

Mr. Landrum: That is right in the exhibit.

The Court: It is all covered.

Mr. John M. Martin: Very well.

Q. By Mr. John M. Martin: Prior to the commencement of the construction of this shipyard, had you had any experience in any other shipyard? A. Yes.

Q. Where, and when, and with whom?

A. Well, Kaiser and his bunch in Portland wanted me to build their shipyards, and asked me to put in a bid. I was too busy to do that work at that time. However, I did put in a bid.

Then I worked, together with the Raymond Concrete Pile Company, and did a portion of the work for the Consolidated Steel shipyard in Los Angeles. I bid on an awful lot of other shipyards, but I didn't do any work on any other ones.

Q. Now, in connection with your original design and layout of this shipyard, what, if any, consideration did you give to designing it in such a manner that it would be suitable for post-war construction of ships. [444]

A. Let me show you that on the plan.

Q. You can step to it, if you care to.

A. This shipyard is quite unique in many ways. When you build a ship, you bring your materials in here (indicating), and before that material gets into that ship you handle it probably about 80 times. Some pieces you handle maybe 125 times. The principle of production is such that if you can put your material here (indicating), handle it over to here, down all the way in a line, you

(Testimony of Carlos Tavares)

save an awful lot of time. This is an ideal shipyard due to its depth. As a matter of fact, any shorter than this would not be an ideal shipyard, because your cross traffic is going on all the time. Now, there is a certain amount of cross traffic, but that cross traffic is limited to a minimum in this particular shipyard.

We designed this shipyard with that main purpose. Then we designed these wet basins. These wet basins,—there aren't any in Los Angeles. There aren't any in San Francisco, except dry docks built by Kaiser for \$40,000,000 on six ways.

So you can see the material comes in here and goes out. In most shipyards the material comes in and goes out, and they have got a trestle up here, where the ship stands, way up in the air, and then it is launched. Now, all shipyards have a 1-way traffic, that is, they start building a ship here, and out she goes, and you can't bring it back. With this shipyard, you can open these gates and bring a ship back, [445] and you can do the reverse operation, send your materials out.

What does that mean? It means that you can repair ships. It means also that you can dismantle ships, salvage ships. It means also that you can knock these dog-goned gates out, and you can bring lumber schooners in, anything you want, and unload them. This whole shipyard was designed with a definite purpose. It is laid out this way, and you can put a fence here and you can sell this off to one party; and you put a fence here (indicating) and sell this off to another party, if you want to. You can do most anything with this shipyard. You have got buildings over here that you can use for building concrete pipe. For instance, you have an office building here,

(Testimony of Carlos Tavares)

which you can use for anything. You have the finest facilities. It is close to town. You have a highway going through here. You have got deep water. There are so many uses that this shipyard can be put to, and it is the only shipyard in—

Mr. Landrum: Just a moment. If the court please, I hate to arise, but I suggest that we proceed in the form of question and answer.

The Court: Yes.

Mr. Landrum: I do not want to be unfair, but I feel he should not lecture the jury.

The Court: You were waxing a little eloquent. [446]

Mr. Crouch: We except to the statement of counsel that the witness was trying to lecture the jury.

The Court: Oh, I don't think he was trying to lecture the jury. A man gets enthusiastic about his work. I do that myself sometimes. I notice that tendency on the part of the bar, too.

Proceed.

Q. By Mr. John M. Martin: Had you finished your statement, Mr. Tavares? A. I was shut off.

Q. Will you proceed and complete your statement, under the admonition which the court has just given you; in other words, not to make an argumentative talk to the jury, but make an explanatory statement of the specific post-war uses for which this shipyard was designed by you, as to which you were in the midst of your statement at the time of the interruption.

A. Well, as you can see, at any time you can have such a variety of operations in any one given plant, and you can adapt it to many different kinds of work. If there are no ships to build, you can repair ships, salvage

(Testimony of Carlos Tavares)

ships, bring other ships in. That would make an ideal tuna fleet basin, which is so lacking here in this town. I mean, anybody can see that the way that yard is laid out, the uses that yard can be put to are very numerous. [447]

Q. You mean it could have been used for a number of purposes other than ship construction?

A. Definitely.

Q. Will you enumerate some of those purposes?

A. Well, it can be used for a lumber yard; it can be used for a concrete pipe-making yard; it can be used even for building houses. It could be used for docking and handling a tuna fleet, building wood boats, building small steel ships, building concrete barges. I mean, almost anything.

Q. You mentioned the building of houses. Have you had any experience in that type of construction?

A. I am building a lot of houses now; about six hundred.

Mr. Landrum: If the court please, I move that answer be stricken, as certainly in 1944 no one could know that he could build six hundred houses in 1947.

Mr. John M. Martin: It is a qualification of the witness to testify as to the post-war use of the yard.

The Court: I think all uses and adaptations are proper. I don't know as to whether the witness' post-war experiences in housing, however, would illustrate his acumen at the time of acquisition.

Mr. John M. Martin: No, it is not offered for that purpose, if the court please.

The Court: All right. Motion denied. [448]

(Testimony of Carlos Tavares)

Q. By Mr. John M. Martin: Mr. Tavares, have you anything further to say with special reference to the drydocking facilities, as to what, if any, advantage that would be to possess such a yard, located as this yard was, for post-war work?

A. Well, the dry-docking facilities primarily are used for repairing and salvaging ships.

Q. Aren't there other dry-docking facilities immediately available in this area?

A. The only dry-docking facilities immediately available in this area is a large dry dock owned by the Navy, that is to say, at the destroyer base, and there is a smaller floating dry dock that also belongs to the Navy, or maybe several of them.

Q. I am referring, though, to privately-owned.

A. I don't think there is a single privately-owned dry dock in this harbor.

Q. Now, as to the general type of construction of these facilities and machinery, can you briefly state what consideration was given to the life of the plant, as you designed it? By that I mean the period over which it would be suitable for use.

A. There are some parts of the plant that were designed early in 1941, and due to the shortage of materials we were not able to design, for instance, dry docks 1 and 2 [449] on a permanent basis, but we made provision that in the event such a thing would occur, these basins could be readily changed from a temporary nature to a more permanent nature with a very small expenditure. But, as a whole, these facilities were built with the idea of following the D.P.C. requirements in our agreements with them. While the buildings were not elaborate, the

(Testimony of Carlos Tavares)

offices, none of them are elaborate, they would last 20 years, or maybe more. While none of the stuff that we put on is as elaborate as other shipyards, they were built solidly, permanently, and can be used for a long time.

Q. What would you say, in your judgment, would be the usable life of those graving docks, wet basins, as constructed?

A. Well, the wet basins 1 and 2, I would say the useful life would go from 10 to 15 years; maybe 10, maybe 15, depending on your maintenance. The graving docks 3 and 4, the steel sheet piles, are good for 50 years.

Q. What about the life of the batching plant?

A. Well, the life of the batching plant, that batching plant is about as good as any batching plant built as a batching plant. I don't remember—oh, that batching plant, if used every day and maintained, would last 20 years. We have not tried to build any plant that would last more than 40 or 50 years. I don't think any industrial plant [450] of this type is designed for more than 20 to 25 years.

Mr. John M. Martin: If the court please, pursuant to stipulation with counsel and with the permission of the court, I would like to read one short stipulation to the jury.

The Court: Very well.

Mr. John M. Martin: It has been stipulated, ladies and gentlemen of the jury, between counsel for the government and counsel for my clients that all of the aforesaid improvements, facilities and machinery were so furnished or constructed by Tavares Construction Company, Inc., without any compensation or fee for its supervisory services in connection therewith, other than the compen-

(Testimony of Carlos Tavares)

sation represented by the granting of D.P.C., which is an abbreviation for Defense Plant Corporation, to said defendants, Tavares Construction Company, Inc. of the option to purchase all, but not part, of said site, facilities and machinery, as set forth in paragraph 15 of the lease agreement. The paragraph 15 referred to is the paragraph 15 in Exhibit W, copies of which were handed the jurors yesterday.

Q. By Mr. John M. Martin: Mr. Tavares, from your experience in construction work, have you an opinion of the basis or amount of a fair supervisory fee for the performance by the contractor of services of the character, nature and extent as were performed by your company here for [451] the Defense Plant Corporation? The question is, have you an opinion. A. Yes, sir.

Q. Will you state that opinion? A. I feel—

Mr. Landrum: Just a moment. Now, if the court please, I suggest that the witness can state a figure there.

The Court: Yes. That does not require any elaboration.

Q. By Mr. John M. Martin: An opinion in dollars and cents, Mr. Tavares, or in percentage, either way?

A. There are so many kinds of a supervisory fee, and unless I can elaborate on it—

The Court: Suppose you take them all and give us the figures on all of them.

Mr. John M. Martin: I will shorten it, if the court please.

Mr. Landrum: Just a moment. If the court please, I feel that we are confined to this particular case. I feel that the question which has been propounded should say,

(Testimony of Carlos Tavares)

if I may be permitted: How much, in your opinion, was a reasonable supervisory fee for this supervision?

The Court: Of course, this is the project we are talking about, and the one in which we are interested. We are not interested in other projects. Manifestly, the [452] question must relate to the issue here, and not to something else.

Mr. John M. Martin: It was so intended, if the court please.

The Court: I so understood it, and you can confine the witness to so answering it.

Mr. John M. Martin: That is right.

Q. By Mr. John M. Martin: Mr. Tavares, you may further assume in stating your opinion that as one element of the supervisory service rendered the contractors guaranteed the maximum cost of the construction of such facilities and machinery.

Mr. Landrum: That is objected to upon the ground and for the reason that no foundation is laid. There is no showing in this case of any such thing.

The Court: I think the contract itself is there, and if you want to propound a hypothetical question, you had better take up the contract and phrase your question to specify just what you mean. The contract, with its amendments, is specific and unequivocal, and there is no question about its terms.

Mr. John M. Martin: I have previously included, or endeavored to include that by directing the witness's attention to Exhibit W, which represents the original lease, with all amendments. [453].

